STATE OF MICHIGAN
IN THE SUPREME COURT

MENARD, INC.,

Petitioner-Appellant,

v

CITY OF ESCANABA,

Respondent-Appellee.

Supreme Court No. 154062

Court of Appeals No. 325718

Michigan Tax Tribunal Docket Nos. 441600 and 14-0001918 (consolidated)

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PETITIONER-APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO COURT'S FEBRUARY 1, 2017 ORDER

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Pursuant to the Court's Order of February 1, 2017, this Supplemental Brief is limited to the following questions:

1. Did the Court of Appeals exceed its limited appellate review of a decision of the Tax Tribunal?

   Appellant Menard, Inc. answers: "Yes."
   Appellee City of Escanaba would answer: "No."
   The Court of Appeals would answer: "No."
   The Tax Tribunal did not address this question.

2. May the Tax Tribunal utilize a valuation approach similar to that recognized in *Clark Equipment Company v Leoni Twp*, 113 Mich App 778; 318 NW2d 586 (1982)?

   Appellant Menard, Inc. answers: "No."
   Appellee City of Escanaba would answer: "Yes."
   The Court of Appeals would answer: "Yes."
   The Tax Tribunal would answer: "No."

I. INTRODUCTION

Petitioner-Appellant Menard, Inc. ("Menard"), sought leave to appeal the May 26, 2016 published Opinion of the Michigan Court of Appeals, which reversed the decision of the Michigan Tax Tribunal (the "Tax Tribunal"). The Court of Appeals' Opinion (the "Opinion") is attached hereto as Exhibit A. The Tax Tribunal's November 7, 2014 Final Opinion and Judgment (the "Final Opinion") is attached hereto as Exhibit B. The Tribunal's January 7, 2015 Corrected Final Opinion and Judgment (the "Corrected Final Opinion") is attached hereto as Exhibit C.

By Order dated February 1, 2017 (the "Order"), the Court directed the clerk to schedule oral argument on whether to grant Menard's Application for Leave to Appeal or take other action, and directed the parties to file supplemental briefs within forty-two (42) days of the date of the Order addressing the following issues:

(1) Whether the Court of Appeals exceeded its limited appellate review of a decision of the Tax Tribunal; and, if so,

(2) Whether the Tax Tribunal may utilize a valuation approach similar to that recognized in *Clark Equipment Company v Leoni Twp*, 113 Mich App 778 (1982).

It is clear that the Court of Appeals exceeded its limited scope of appellate review and improperly substituted its judgment and credibility determinations for those of the Tax Tribunal. Furthermore, the Court of Appeals' endorsement of the valuation approach used in *Clark Equipment* was unlawful because it conflicts with the market-based standard of valuation required by the General Property Tax Act, MCL 211.1 *et seq.*, ("GPTA"). This case meets the grounds for appeal of MCR 7.305(B)(3) and MCR 7.305(B)(5) because the Court of Appeals' published Opinion involves legal principles of major significance to Michigan's jurisprudence and is clearly erroneous, will cause material injustice if not reversed, and conflicts with other decisions of this Court and the Court of Appeals.

For the reasons given herein and in Menard's Application for Leave to Appeal, Menard respectfully requests that this Court grant leave to appeal, reverse the Court of Appeals' Opinion and reinstate the Tax Tribunal's Corrected Final Opinion and Judgment. In the alternative, Menard respectfully requests that, in lieu of granting leave to appeal, the Court peremptorily reverse the Court of Appeals' Opinion and reinstate the Tax Tribunal's Corrected Final Opinion and Judgment.

II. ARGUMENT

A. The Court Of Appeals Exceeded Its Limited Appellate Review of a Decision of the Tax Tribunal.

The Court of Appeals' Opinion below addressed two issues: (1) the sales-comparison approach to value; and, (2) the "cost approach"[1] to value submitted by the assessor for Respondent-Appellee, the City of Escanaba (the "City"). With regard to the sales-comparison approach, the Court of Appeals determined that because four of the eight sales comparables used by Menard's appraiser contained deed restrictions, "the Tribunal erred in finding Menard's sales-comparison approach meaningful in its determination of the subject property's [true cash value]." Opinion at 7-8. With regard to the cost approach, the Court of Appeals concluded that "the tribunal committed error in refusing to consider Escanaba's evidence under the cost-less-depreciation approach." Opinion at 10.

With regard to both issues, the Court of Appeals improperly exceeded its scope of review because it: (1) ignored the competent and substantial evidence supporting the Tribunal's factual findings, failing to consider the entire record; (2) intruded on the Tribunal's duty to select the most

[1] Although the Court of Appeals stated that the City's valuation methodology was a "cost approach" to valuation, it was actually a mass appraisal approach in which the assessor merely input data into software, which computed a value. Transcript of August 14, 2014 Hearing before the Tax Tribunal ("Transcript") at 144-45; 166. A copy of the Transcript was attached as Exhibit D to Menard's Application for Leave to Appeal. As further explained herein, the City's methodology was also not a true cost approach to valuation because it made no attempt to account for obsolescence. Nevertheless, because the Court of Appeals referred to the City's method as a cost approach, Menard will also refer to it as such to avoid confusion.

appropriate valuation method based on the record evidence; and, (3) overturned the Tribunal's determination of witness credibility and the weight to be assigned to evidence.

1. The Standard of Review of Tax Tribunal Decisions Is Limited.

This Court has recognized that, under the requirements of the State Constitution, the standard of review of Tax Tribunal decisions is limited. This Court succinctly articulated that standard of review in *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 632; 462 NW2d 325 (1990):

> As this Court has frequently recognized in the past, our review of property tax assessment appeals is tempered by a constitutionally mandated standard of review:
>
> > In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation. Const 1963, art 6, § 28.
>
> It is the province of the Tax Tribunal to apply its expertise to the facts of each case to determine the appropriate method of arriving at the cash value, or fair market value, of the subject property. The factual findings of the tribunal are final, provided they are supported by competent and substantial evidence. *Antisdale v City of Galesburg*, [420 Mich 265, 277; 362 NW2d 632 (1984)]. See also *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988); *Fisher-New Center Co v State Tax Comm (On Rehearing)*, 381 Mich 713; 167 NW2d 263 (1969).

In addition, this Court has recognized that it is the Tax Tribunal's duty to determine the appropriate valuation method based on its expertise and the evidence presented. *Id*. See also *Antisdale*, 420 Mich at 277 ("It is the duty of the tax tribunal to select the approach which provides the most accurate valuation under the circumstances of the individual case."); *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991) (same). See also *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353; 483 NW2d 416 (1992) ("The Tax Tribunal is under a duty to apply its expertise to the facts of a case to determine the appropriate

method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances.")

The credibility of the witnesses and the weight to be given to evidence are matters for the Tax Tribunal to determine. *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 436; 830 NW2d 785 (2013); *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 636; 806 NW2d 342 (2011). See also *Webber v Steiger Lumber Co*, 322 Mich 675, 682-683; 34 NW2d 516 (1948) ("Credibility and weight of the testimony are for determination of the commission, and in that respect we are bound by the commission's findings."). The Court of Appeals is not to interfere with the Tax Tribunal's determinations of the weight to assign to evidence or to substitute its judgment for that of the tribunal, even if it would have reached a different result. *Id*; *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 701-702; 840 NW2d 168 (2013). See also *Drew v Cass Co*, 299 Mich App 495, 501; 830 NW2d 832 (2013).

2. The Court of Appeals Exceeded Its Limited Scope of Review With Regard to the Sales Comparison Approach.

The Court of Appeals held that, because four of the eight primary[2] sales comparables used by Menard's appraiser contained deed restrictions, "the Tribunal erred in finding Menard's sales-comparison approach meaningful in its determination of the subject property's [true cash value]." Opinion at 7-8. In making this determination, the Court of Appeals overturned the Tribunal's factual finding that Menard's appraiser "did take [deed restrictions] into consideration in developing his sales comparison analysis and determined that the deed restrictions, on those properties that he utilized, had no effect on the properties' sales prices, and the Tax Tribunal found this testimony, and analysis

[2] In addition to the eight primary sales comparables analyzed for each year under appeal, Menard's appraiser included a chart of thirty other comparables similar to the subject property. Transcript at 55-56 (describing the chart on page 42 of Petitioner's Exhibit 1).

regarding the same, to be credible." Corrected Final Opinion at 2.[3] In so doing, the Court of Appeals exceeded the constitutionally mandated standard of review and improperly substituted its judgment for that of the Tribunal, which has more experience in the area and was able to weigh the testimony and determine the credibility of the witnesses.

The factual findings of the Tribunal are final and conclusive if they are supported by competent and substantial evidence in the whole record. *Edward Rose Bldg Co*, 436 Mich at 632; *Antisdale*, 420 Mich at 277; Const.1963, art. 6, § 28. Substantial evidence is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion" and it may be "substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692, 698; 514 NW2d 121 (1994). See also *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998).

The Tribunal's conclusion regarding the impact (or lack thereof) of deed restrictions and that they did not preclude use of the sales comparison approach was amply supported by competent and substantial evidence in the record. Indeed there was not just enough evidence "that a reasonable mind would accept as sufficient to support" the Tribunal's conclusion, there was a voluminous amount of evidence supporting the Tribunal's conclusions. Menard's appraiser testified:

- that he took deed restrictions into consideration. Transcript at 31;
- that he would not consider a property as a sales comparable if it had deed restrictions that affected the sales price and that, in the sales he considered, deed restrictions did not affect the sales price. Transcript at 47-48;
- as to the steps he took to determine whether deed restrictions affected the sales price, including consulting with the brokers, sellers and buyers involved in the transactions, who confirmed whether the deed restrictions affected the sale prices. Transcript at 64-66;

[3] Indeed, the Tax Tribunal considered the impact of deed restrictions not once but twice. See Final Opinion at 8, 16 and Corrected Final Opinion at 2.

- that he did not consider the sale of a Target store in Warren due to the presence of deed restrictions. Transcript at 86-87;

- that some of the "deed restrictions" about which the City complains are actually operating agreements that impose reciprocal obligations on properties within a shopping center, such as requirements for lighting and parking, and may actually benefit the property because it gets higher retail traffic from the shopping center. Transcript at 89-92; and,

- why certain deed restrictions had no impact on the sale price of the properties. Transcript at 119-120.[4]

The Tax Tribunal found this evidence to be competent, substantial, and material, and the Court of Appeals' finding to the contrary has no support in the record. Indeed, the only contrary testimony was testimony by the City's assessor that she was simply "not comfortable" with making a determination as to the value of use restrictions, and that she felt the deed restrictions had "an effect on the valuation, and without compared sales analysis you don't know what this difference is. And it's not appropriate to use something with use restrictions that do affect the value." Transcript at 153, 155. The Tax Tribunal found the City's assessor's discomfort with determining the impact of deed restrictions to be "an indication of [the City's assessor's] valuation inexperience"[5] (Final Opinion at

[4] Menard's appraiser testified that a common deed restriction on the subject comparables prohibited the use for "adult clubs," "adult bookstore," or "adult video store" on the larger development of which the property was a part, however, such restricted uses were unlikely to be considered viable and so commonly restricted on commercial developments that it does not affect sales price. Transcript at 65, 120. Another comparable, a former Wal-Mart, had use restrictions on the property relating to use as a grocery store over 35,000 square feet or a discount store more than 50,000 square feet. However, Menard's appraiser testified that a typical "Walmart" would have a grocery store area and discount store area of those sizes, and therefore, the restriction did not impact the comparable's sales price. Transcript at 65, 119-121. Yet another comparable, also a former Wal-Mart, was purchased by a secondary but well-known retailer "that may compete with Wal-Mart in some sense," but "the deed restrictions that Wal-Mart had in place didn't affect the use of that similar retail user." Transcript at 65-66.

[5] The inexperience of the City's assessor and the factual bases for the Tribunal's determination that her testimony was not to be credited is discussed in greater detail in Section II.A.2 of this Brief. In addition to the inexperience of the City's assessor, another reason the City's assessor may not have been able to determine the impact of deed restrictions was her lack of information. According to the City's assessor's testimony, she had difficulty obtaining information. See Transcript at 152 ("it's a

13), and discredited her testimony while the Court of Appeals inexplicably found it persuasive. In making that determination, the Court of Appeals ignored the well-established rule that the Court of Appeals is not to disturb findings of witness credibility.

The factual findings of the Tribunal were clearly supported by competent and substantial evidence and were therefore conclusive.[6] *Edward Rose Bldg*, 436 Mich at 632; *Antisdale*, 420 Mich at 277. The Court of Appeals review regarding this issue should have ended at this point.

Despite the foregoing, the Court of Appeals completely disregarded Menard's appraiser's testimony and found, without citation to the record that, simply because the use restrictions existed in some of the comparable properties, the sale price of those comparables "did not reflect the full value of the unrestricted fee simple." Opinion at 8. This finding directly contradicts the Tax Tribunal's finding – amply supported by the evidence, as discussed above – that Menard's appraiser "did take such factor [deed restrictions] into consideration in developing his sales comparison analysis and determined that the deed restrictions, on those properties that he utilized, had no effect on the properties' sales prices, and the Tax Tribunal found this testimony, and analysis regarding the same, to be credible." Corrected Final Opinion at 2.[7] The Court of Appeals below improperly substituted

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little bit difficult when you're the assessor because no one seems to be very forthcoming with information. . . .").

[6] There was also additional evidence in the record supporting the Tax Tribunal's use of the sales comparison approach. The Tax Tribunal found that Menard's appraiser "provided extensive sales of big box stores throughout the state … [which] included comparables in southeast Michigan, as well as other competing market areas." Final Opinion at 16. In addition to the eight sales analyzed for each year under appeal, Menard's appraiser included a chart of thirty other comparables similar to the subject property to confirm that the sales comparison valuation was "in the ballpark" and that a very active market for these types of properties does exist. Transcript at 55-56 (describing the chart on page 42 of Petitioner's Exhibit 1).

[7] The Court of Appeals also noted that the sales price per square foot of building area for Comparable Sales 6 and 7 were the highest and that those two properties did not have deed restrictions. Opinion at 3. Again, the Court of Appeals is "cherrypicking" the record. Comparable Sales 6 and 7 had the smallest buildings of all the sales comparables and their buildings were less than one-third the size of

its judgment for that of the Tax Tribunal, in direct contravention to binding precedent of this Court and prior decisions of the Court of Appeals.

Further, it is clear that the Court of Appeals failed to fully consider the context of the cases on which it relied regarding the impact of deed restrictions. Opinion at 7. Those cases include *Helin v Grosse Pointe Twp*, 329 Mich 396; 45 NW2d 338 (1951), *Lochmoor Club v Grosse Pointe Woods*, 10 Mich App 394; 159 NW2d 756 (1968), and *Kensington Hills Development Co v Milford*, 10 Mich App 368; 159 NW2d 330 (1968), each of which require that all factors, including restrictions imposed on property must be *considered* in determining a property's true cash value (emphasis added), and each of which are wholly distinguishable from the instance case.

In *Helin*, for example, the residential property in that case could not be used for an apartment house, multiple residence, or institutional purposes, and instead, was restricted to use for a single residence. *Helin*, 329 Mich at 407. As the record showed, because the costs associated with utilities and general upkeep were prohibitively expensive, some of the surrounding owners of similar homes either tore down their houses or allowed them to be sold for taxes, or sold them for but a small fraction of their original cost. *Id*. Accordingly, this Court found the restrictions were "largely responsible for the destruction of the larger part of the value of the property and should result in a very material

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the Menard store at issue in this case. Transcript at 114; Exhibit P-1 at 41. Indeed, the Tribunal found Comparable Sale 7 to be an "outlier." Final Opinion and Judgment at 17. The two sales comparables that had no deed restrictions and were closest in size to the subject property, Comparable Sales 2 and 4, sold for adjusted sales price of $20.10 per square foot and $19.42 per square foot, respectively, which were very similar to the Tribunal's concluded value of $20.00 per square foot for the subject property. Exhibit P-1 at 41; Final Opinion and Judgment at 17. Thus, one could throw out every restricted sales comparable and there would still be competent and substantial evidence in the record supporting the Tribunal's decision.

reduction in assessments."[8] *Id.* *Lochmoor*[9] and *Kensington*[10] are likewise distinguishable. In comparison to those cases cited by the Court of Appeals, which are obvious examples of deed restrictions detrimentally affecting a property's market value, the record evidence in this case demonstrates the opposite.

Additionally, the Court of Appeals reversal of the Tax Tribunal with regard to the deed restriction issue was improper because, in doing so, the Court of Appeals improperly substituted its judgment regarding witness credibility for the Tribunal's. The Tribunal found the testimony of Menard's appraiser that the deed restrictions had no effect on the properties' sales prices "to be credible." Corrected Final Opinion at 2. The credibility of the witnesses and the weight to be accorded to evidence are exclusively matters for the Tax Tribunal to determine. *Pontiac Country Club v Waterford Twp*, 299 Mich App at 436; *President Inn Props, LLC v Grand Rapids*, 291 Mich App at 636. Although the Tax Tribunal's decisions must be based on competent and substantial evidence, the *weight* to be given that evidence is a matter within the Tax Tribunal's discretion.

[8] Additionally, the Court of Appeals failed to acknowledge that, in *Helin*, this Court ruled in favor of the taxpayer in challenging its assessment based upon the cost of reproduction less depreciation and obsolescence, which they claimed resulted in an assessment so excessive and constructively fraudulent as to make it illegal. 329 Mich at 400-408.

[9] In *Lochmoor*, the Court of Appeals found that the State Tax Commission's field staff appraisal flatly ignored restrictions which limited the property solely to use as a park or country club purposes and valued the property as a residential subdivision. *Lochmoor*, 3 Mich App At 530-531 (emphasis added.) No restrictions were "flatly ignored" in this case.

[10] In *Kensington*, the Court of Appeals found that "[z]oning restrictions are real and, during their duration, limit the use of the property as much as deed restrictions. Just as it is error to fail to consider deed restrictions in establishing assessments, it is error to assess noncommercial property on the proposition that it will ultimately be zoned commercially." *Kensington*, 10 Mich App at 371-372 (citations omitted.) Thus, the assessed value was improper, as it set a value for the property based on an illegal use. No such consideration is presented in this case.

Teledyne Continental Motors v Muskegon Twp, 163 Mich App 188, 191; 413 NW2d 700 (1987); *Kern v Pontiac Twp*, 93 Mich App 612, 622; 287 NW2d 603 (1976).

Lastly, the Court of Appeals decided to substitute its judgment as to the proper valuation approach for that of the Tax Tribunal. In doing so, the Court of Appeals disregarded this Court's repeated admonitions that "[i]t is the province of the Tax Tribunal to apply its expertise to the facts of each case to determine the appropriate method of arriving at the true cash value, or fair market value, of the subject property." *Edward Rose Bldg Co*, 436 Mich at 632; 462 NW2d 325 (1990). See also *Antisdale*, 420 Mich at 277.

3. The Court of Appeals Exceeded Its Limited Scope of Review With Regard to the "Cost Approach."

With regard to the cost approach, the Court of Appeals concluded that "the tribunal committed error in refusing to consider Escanaba's evidence under the cost-less-depreciation approach." Opinion at 10. In making this determination, the Court of Appeals ignored and effectively overruled the Tax Tribunal's findings that: (i) the City's assessor lacked valuation experience and there were several "inconsistencies, contradictions and misrepresentations" in the City's documentary and testimonial evidence (Final Opinion at 12-14; 16); and (ii) the City's assessor's cost approach should not be given any "weight or credibility in the determination of market value" because she failed to account for functional and external obsolescence (which is sometimes called "economic obsolescence)[11] and instead merely utilized State Tax Commission guidelines for mass appraisal, which the Tax Tribunal found inappropriate for the valuation of a single property (*Id*., pp. 12-13).

[11] See The Appraisal of Real Estate, 14 ed. at 632 ("External obsolescence is sometimes called economic obsolescence. . . ."); *Meadowlanes*, 437 Mich at 503 (calling the term "economic or external obsolescence").

The Tribunal's conclusion that the City's assessor lacked experience and was not credible is well supported by the record. The City's assessor was not a licensed real estate appraiser. Transcript at 139; Final Opinion at 10. See also the "Valuation Summary" prepared by the City's assessor (Exhibit R-1 before the Tax Tribunal) at 4 (stating that "[t]he author is in no way trying to impersonate their self [sic] as a licensed appraiser."). Generally, only licensed real estate appraisers are allowed to engage in expressing an opinion as to the value of real property. MCL 339.2601(a) and MCL 339.2607(1). Although tax assessors are exempt from this requirement pursuant to MCL 339.2601(a)(iii), the City's assessor in this case had never before even prepared an appraisal report. Transcript at 140.

The Court of Appeals erroneously stated that the City's assessor was qualified as an expert in "appraisal." Opinion at 4. The City's assessor, however, was actually qualified only "as an expert in real estate assessing and mass appraisal. . . ." Transcript at 141; MTT Final Opinion at 5. "Mass appraisal" is "the process of valuing a universe of properties as of a given date using standard methodology, employing common data, and allowing for statistical testing." Uniform Standards of Professional Appraisal Practice, 2016-2017 edition ("USPAP")[12], at 4 (relevant pages of USPAP are attached as Exhibit D hereto). The City's assessor was *not* qualified as an expert in the appraisal or valuation of individual properties. Menard's appraiser, on the other hand, was a licensed real estate appraiser and was qualified "as an expert in the field of real estate appraisal." Transcript at 15, 17.

The Tribunal found that the City's assessor's "steadfast adherence to the State Tax Commission guidelines for mass appraisal is commendable but misplaced for the valuation of a single property." Final Opinion at 13. In that regard, the Tribunal was totally correct. Indeed, USPAP

[12] USPAP is required to be utilized by licensed real estate appraisers. MCL 339.2605(1). The City's assessor testified that she had taken classes on USPAP. Transcript at 136.

specifically warns that "[i]t is implicit in mass appraisal that, even when properly specified and calibrated mass appraisal models are used, some individual value conclusions will not meet standards of reasonableness, consistency, and accuracy." USPAP at 45.

Similarly, there is ample record support for the Tribunal's conclusion that the City's assessor's cost approach should not be given any "weight or credibility in the determination of market value" because she failed to account for functional and external obsolescence but merely utilized State Tax Commission guidelines for mass appraisal which the Tax Tribunal found inappropriate for the valuation of a single property. Final Opinion at 12-13. The City's assessor flatly stated that she did not apply any obsolescence in her cost approach. Transcript at 188. The "Valuation Summary" prepared by the City's assessor contained the disclaimer that "[t]he sole purpose of this 'Valuation Summary' is to properly disclose the methods used by the assessor to accurately value property using assessment practices as encouraged by the Michigan State Commission." Final Opinion at 9, citing Respondent's Exhibit R-9, p 4. Furthermore, what the Court of Appeals generously referred to as a "cost less depreciation approach" to value (Opinion at 8-11) was actually just the City's assessor's property record cards that were generated using a software program designed for mass appraisal. Transcript at 144-145; 166. See also Transcript at 180 (City's assessor testifying that she made no adjustments to the numbers generated by the software program).

Furthermore, it is clear that the Tribunal correctly disregarded the City's assessor's testimony regarding a cost approach to valuation because she failed to account for functional obsolescence[13] or,

[13] "Functional obsolescence … refers to a flaw in the structure, materials or design of the improvements. It can occur when the subject does not have a feature the market demands (air conditioning, for example), or *when it has a feature for which the market is unwilling to pay (the excess ceiling height).*" Valuation of Big-Box Retail for Assessment Purposes: Right Answer to the Wrong Question, David Charles Lennhoff, CRE, MAI, Real Estate Issues, Vol 39, No 3, 2014, p. 29. (Emphasis added). See also Exhibit P-1 at 75 (defining "functional obsolescence" as "[t]he impairment of functional capacity of a property according to market tastes and standards."

for that matter, any obsolescence. Not only did the City's assessor fail to account for functional obsolescence, she failed to account for external obsolescence as well. This Court has held that, if the cost approach is used, the physical deterioration, functional and external obsolescence must all be accounted for. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484; 473 NW2d 636 (1991). The weight to be accorded to this evidence is within the Tax Tribunal's discretion. *Great Lakes*, *supra* at 404 (finding that "[i]t did not constitute an error of law or wrong principle for the Tax Tribunal to reject [the city's] proposed [cost-less-depreciation] valuation.")

Depreciation and obsolescence from all sources must be quantified to properly perform a cost approach. *Meadowlanes*, 437 Mich at 484 n 18; *Appraisal of Real Estate*, 14th Ed. at 576-578. The Tribunal therefore properly rejected the City's cost approach because it did not account for these factors. Specifically, the Tribunal held as follows:

> Regarding a cost approach analysis, the subject improvements are less than ten years old and would indicate minimal physical depreciation. However, Respondent's assessor did not account for functional or external obsolescence within her cost approach to value. Petitioner's assertion to the limitations of the cost approach is noteworthy in this instance. Built-to-suit construction, 2nd generation users, and renovation costs demonstrate functional obsolescence which is difficult to calculate. Petitioner has convincingly articulated that lst generation users develop big box retail space to enhance retail sales and not to optimize market value to the property. For these reasons, Respondent's cost approach is given no weight or credibility in the determination of market value for the subject property. [MTT Final Opinion and Judgment at 13.]

There was ample testimony supporting this conclusion and it was erroneous for the Court of Appeals to disturb it.

The Court of Appeals relied on the City's assessor's incompetent testimony as to functional obsolescence, and came to a completely incorrect and unsupportable conclusion that "[t]here was no evidence in the record of any deficiency in the subject premises." (Opinion, p. 11.) Tellingly, the only testimony from the assessor on this point was the following:

> Q. Is it your feeling that obsolescence does not exist in this building?
>
> A. Functional obsolescence doesn't seem to apply because if Menard's was going to build the store tomorrow, they'd build the same exact store. They have the same ceiling height. They've got the same footprint. They've got their plans that they use to build their building, so what -- I did not feel that there was a functional obsolescence.
>
> Q. So you were assessing it as being used by its existing use; is that correct?
>
> A. As a retail use, yes.
>
> Q. As an existing use as a Menard's?
>
> A. As a retail use.
>
> Q. I see. And so as a retail use you don't think there was functional obsolescence?
>
> A. No. Because there are other retail uses that would use the components of that building.
>
> Tr. At 188-189.

It is incorrect, however, to say that there is no functional obsolescence simply because the current owner would build the same building.[14] Indeed, custom built properties[15] generally have functional obsolescence built into them from day one. Transcript at 20, 26, 60. The principle that custom built improvements to real property do not necessarily add to the value of the property has been recognized by this Court. *First Federal Savings & Loan Ass'n of Flint v Flint*, 415 Mich 702,

[14] Furthermore, the City's assessor was not qualified as an expert to opine as to the type of building Menard would build, so this opinion testimony on that subject was clearly incompetent.

[15] Build-to-suit big-box stores like the property at issue in this case are built by their owners for their particular use without regard to the resale value of the property. Transcript at 60-61. Similarly, in *Clark Equipment*, the Court of Appeals similarly recognized that "Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. Such plants are not constructed like small commercial buildings or residential structures with only a mere hope or expectation on the builder's part that the plant will be sold." 113 Mich App at 785.

705; 329 NW2d 755 (1982). In any event, the City's assessor acknowledged the presence of functional obsolescence when she admitted that "there are other retail uses that would use the *components* of that building." Transcript at 189 (emphasis added). Although "components" of the building may very well be used if the property was purchased and put to another retail use, this statement demonstrates that at least some functional obsolescence existed because only certain "components" of the building would be used by a subsequent purchaser. Therefore, some components would not be used and would not have value to a purchaser. Again, however, the Tribunal found the City's assessor's testimony not to be credible. Final Opinion at 12-13. Such credibility determinations are entrusted to the Tribunal and should not be disturbed on appeal.

Because the Tribunal's findings regarding the deficiencies in the City's cost approach were supported by competent and substantial evidence in the record, the Court of Appeals erred and exceeded its scope of review in reversing those findings. *Antisdale*, 420 Mich at 277; *Continental Cablevision*, 430 Mich at 735. The Court of Appeals also erred in overturning the Tribunal's findings regarding witness credibility. *Pontiac Country Club*, 299 Mich App at 436; *President Inn Props*, 291 Mich App at 636. The most egregious error, however, was the Court of Appeals mandate that the Tribunal consider the City's cost approach after the Tribunal had determined that the City's approach was unreliable and incomplete. Opinion at 8. "It is the province of the Tax Tribunal to apply its expertise to the facts of each case to determine the appropriate method of arriving at the cash value, or fair market value, of the subject property." *Edward Rose*, 436 Mich at 632. It was both erroneous and inappropriate for the Court of Appeals to mandate that the Tribunal consider a particular valuation methodology after the Tribunal has considered the record evidence and determined that a particular methodology is inappropriate. *Id*. See also *Antisdale*, 420 Mich at 277.

B. The Michigan Tax Tribunal May Not Use A Valuation Standard Similar to That Recognized in *Clark Equipment.*

The valuation standard used in *Clark Equipment* was a value in use standard, not a standard based upon what the property would sell for on the market. Therefore, the valuation standard used in *Clark Equipment* is unlawful and contrary to the statutory valuation standard, which requires market value.

The GPTA is the statutory basis for Michigan property taxation and requires that property taxes be based upon "true cash value." MCL 211.27a(1). MCL 211.27(1) defines true cash value as follows:

> (1) As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.

The term "true cash value" is synonymous with market value. *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450; 221 NW2d 588 (1974) ("The concepts of 'true cash value' and 'fair market value' in this state are synonymous"); *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484 n. 17; 473 NW2d 636 (1991) (same); *First Federal*, 415 Mich at 703 (holding that "the constitution and the General Property Tax Act require that property tax assessments be based on market value, not value to the owner. . . .").

In *Clark Equipment*, 113 Mich App 778; 318 NW2d 586 (1982), the Court of Appeals held:

> The problem with valuing large industrial plants is a problem with the statutory standard itself. The reality is that these types of industrial plants are rarely bought and sold, so that a determination of "usual selling price" constitutes a metaphysical exercise which puts the Tax Tribunal in the position of having to resolve a question somewhat akin to how many angels can dance on the head of a pin. Petitioner may well be correct in its assertion that there is no market for its industrial plant at its current use. However, as we construe MCL § 211.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the

> functions currently performed in the subject plant, said buyer would consider purchasing the subject property, the usual selling price can be based upon value in use. To apply MCL § 211.27, a hypothetical buyer must be posited, although, in actuality, such a buyer may not exist. To construe MCL § 211.27 as requiring the taxing unit to prove an actual market for a property's existing use would lead to absurd under valuations. Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. Such plants are not constructed like small commercial buildings or residential structures with only a mere hope or expectation on the builder's part that the plant will be sold. When a large corporate entity such as Ford or General Motors builds a factory, it is probable that absolutely no market exists for the resale of that factory consistent with its current use. It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost premised on value in use because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists. This is in accordance with *First Federal Savings, supra*, 619-620,. . . .
>
> *Id*. at 784-786 (emphasis added).

The quotation above is the crux of the Court of Appeals decision in *Clark Equipment* and, tellingly, it begins with the Court of Appeals finding a perceived "problem" in the statutory valuation standard that would lead to what the Court of Appeals believed would be an "absurd" result. To avoid that result, the Court of Appeals departed from the statutory standard and endorsed an unlawful "value in use" standard. In doing so, the Court of Appeals failed to adhere to the foremost rule of statutory construction – that unambiguous statutes are enforced as written. "If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citations omitted).

The only authority cited by the *Clark Equipment* panel for substituting the statutory definition of true cash value with the value in use standard was the Court of Appeals' decision in *First Federal Savings & Loan Ass'n of Flint v Flint,* 104 Mich App 609; 305 NW2d 553 (1981). That decision was subsequently reversed by this Court in December 1982, shortly after the March 1982 *Clark Equipment* decision.[16] *First Federal Savings & Loan Ass'n of Flint v Flint,* 415 Mich 702; 329 NW2d 755 (1982). Thus, when this Court decided *First Federal,* it overturned the basis for the *Clark Equipment* decision, which was the basis for the Court of Appeals' Opinion.

This Court's decision in *First Federal, supra,* is the leading case on the issue of the statutory requirement that a property's true cash value be based upon its usual selling price rather than value in use. *First Federal* involved the valuation of an office building in downtown Flint. In succinctly summarizing the case and its decision this Court held:

> The Tax Tribunal and the Court of Appeals, 104 Mich App 609, 305 NW2d 553, approved the assessment, reasoning that the improvements had value to First Federal because they enhanced its image. Because the Constitution and the General Property Tax Act require that property tax assessments be based on market value, not value to the owner, we reverse. [415 Mich at 703].

In elaborating on the Tribunal and Court of Appeals decisions at issue, this Court said:

> A Tax Tribunal hearing officer upheld Flint's use of the cost approach, reasoning that the improvements had value to First Federal because they enhanced a financial institution's image of stability and success. The Tax Tribunal adopted the decision of the hearing officer.
>
> The Court of Appeals affirmed the judgment of the Tax Tribunal and held that the income approach was inappropriate because the property had a unique value to First Federal. [415 Mich at 704].

[16] The Tribunal decision in *Clark Equipment* was appealed to the Court of Appeals on two grounds. The Court of Appeals upheld a value in use standard as a substitute for usual selling price but decided in favor of the taxpayer on the other ground. See *Clark Equipment,* 113 Mich App at 788. As a result, the taxpayer in *Clark Equipment* did not appeal.

This Court, however, reversed the Court of Appeals decision in *First Federal*, rejected property taxation based upon value in use, and made it crystal clear that the lawful value standard must be the market-based usual selling price, holding:

> [T]he constitutional and statutory standard is market-based.
>
> The Tax Tribunal erred in adopting the hearing officer's reasoning that the value should include amounts expended for physical improvements that the hearing officer found were made to enhance the bank's "image" or "business", without regard to whether the expenditures added to the "cash" or "usual selling price" of the property. The law does not tax expenditures that merely enhance the image or business of the owner, only expenditures that add to the cash value or selling price of the property.
>
> It can be anticipated that, if a bank puts fine hardwood and marble throughout a building, those expenditures may not enhance the selling price of the building in an amount equal to their cost.
>
> * * *
>
> A building is sometimes worth less the day after completion of construction than its cost of construction. . . .[5]
>
> ---
>
> [5] Merely because the owner may have constructed an improvement that cost more than the improvement is worth on the market should not subject the owner to higher ad valorem tax.
>
> [415 Mich at 705-706 (emphasis added)].

This Court went on to make it clear that the statutory test is market driven, not cost driven. That is, property tax is not imposed upon the cost of the components of property but, instead, upon the market value of the whole property. Specifically, the Court held in *First Federal* that:

> The Constitution and statute do not authorize a tax on the value of lumber or marble incorporated into a building, but on the market value of the completed structure and land.
>
> * * *
>
> [W]e reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add to the selling price of the building. [415 Mich at 705-707].

The value in use standard adopted in *Clark Equipment* is not based on what potential purchasers are willing to pay in the open market. Therefore, value in use analysis is inconsistent with the usual selling price value standard set forth in the GPTA. As this Court observed in *First Federal*, "[a] greenhouse, a gazebo, a tennis court, or a hot tub, while of value to the owner, do not necessarily add dollar-for-dollar to the usual selling price." 415 Mich at 706 n 6. These examples show why the Court of Appeals erred in disposing of functional obsolescence based on whether "the same building would be built by Menard if it were to build a new store." Opinion, p 11. The market, and not value to the specific property owner who constructs an improvement, is the source for determining whether functional obsolescence exists and its amount.

The Court of Appeals in *Clark Equipment* attempted to justify its analysis by claiming that MCL 211.27 requires that it posit the existence of a "hypothetical buyer." 113 Mich App at 785. The *Clark Equipment* decision then leaps from positing the existence of a hypothetical buyer to positing the existence of a hypothetical buyer that would pay the depreciated[17] construction cost for the industrial facility at issue in that case. Positing the existence of a hypothetical buyer, however, does not mean positing the existence of a fool who would pay more than the market price.[18] The Court of Appeals held that property "must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists." 113 Mich App at 785. But there was no

[17] The *Clark Equipment* decision allowed only deduction for physical depreciation from construction costs and not other forms of obsolescence, such as functional or external obsolescence. 113 Mich App at 786.

[18] Even if a particular market participant attaches an extremely high value to a property, that participant will purchase the property by only slightly outbidding the second-highest bidder. Thus, the value of the property to the current owner is not the issue. Rather, it is the market value that is the issue. This conclusion is also consistent with precedent that forbids valuation based on the value to the owner rather than value on the market. *Edward Rose Building Co v Independence Twp*, 436 Mich 620, 640-41; 462 NW2d 325 (1990).

evidence that there was no prospective buyer for the property in *Clark Equipment*, merely that there was no buyer who would pay the price the Court of Appeals believed the property was worth. The taxpayer in *Clark Equipment* took the position that the property was worth $5,000,000. 113 Mich App at 780. The taxpayer, therefore, "posited the existence" of a hypothetical buyer that would pay that amount for the property. Therefore, stripped to its essence, the Court of Appeals decision in *Clark Equipment* can be summarized as: "If there is no buyer at the preconceived price the court believes the property should fetch, the court will simply imagine that there is one." If that valuation standard is endorsed, the only limit on property values will be the imagination of tax assessors.

A simple example demonstrates the error of the Court of Appeals decision in *Clark Equipment*. Suppose a family with 14 children determines that it needs a 12-bedroom home with 6 bathrooms. Such homes are extremely rare and the family would likely be forced to pay to construct such a home and the construction costs would almost certainly be high given the unique layout of the home. However, if that family were to sell that 12-bedroom home shortly after construction, the home would almost certainly sell for a price that was well below the construction costs because there are few buyers who desire 12-bedroom homes and would attribute value to its unique design. MCL 211.27 requires that such a home be valued using the "usual selling price" (i.e., the price it would fetch on the market) while the Court of Appeals approach in *Clark Equipment* would simply imagine the existence of a hypothetical buyer that needed a 12-bedroom home and would pay the construction cost for the already built home. This approach was rejected by this Court in *First Federal*.[19]

[19] Menard is not arguing that an appropriately supported and applied cost-less-depreciation approach may never be used by a properly qualified appraiser to determine the true cash value of property. In order to properly utilize that approach, however, all forms of depreciation, including functional, physical and external obsolescence, must be accounted for because such adjustments are essential in ensuring that the resulting value reflects market value and not value in use.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons given herein and in Menard's Application for Leave to Appeal, Menard respectfully requests that this Court grant leave to appeal and, on appeal, reverse the Court of Appeals' Opinion and reinstate the Tax Tribunal's Corrected Final Opinion and Judgment. In the alternative, Menard respectfully requests that, in lieu of granting leave to appeal, the Court reverse the Court of Appeals' Opinion and reinstate the Tax Tribunal's Corrected Final Opinion and Judgment.

Respectfully submitted,

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Dated: March 15, 2017

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INDEX TO EXHIBITS

Exhibit A

STATE OF MICHIGAN

COURT OF APPEALS

MENARD, INC.,

Petitioner-Appellee,

v

CITY OF ESCANABA,

Respondent-Appellant,

and

MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, MICHIGAN ASSOCIATION SCHOOL BOARDS, MICHIGAN SCHOOL BUSINESS OFFICIALS, MICHIGAN ASSOCIATION OF COUNTIES, and MICHIGAN ASSESSORS ASSOCIATION,

Amici Curiae.

FOR PUBLICATION
May 26, 2016
9:10 a.m.

No. 325718
Tax Tribunal
LC No. 00-441600;
14-001918-TT

Before: TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

This case arises out of ad valorem property tax assessments for the tax years 2012, 2013, and 2014. The subject property is a 166,196 square foot "big-box" store built on 18.35 acres and located in Escanaba, Michigan. After a hearing on petitioner Menard, Incorporated's challenge to respondent City of Escanaba's tax assessment, the Michigan Tax Tribunal (the tribunal) rejected Escanaba's assessment and found in favor of Menard. Because we conclude that the tribunal made an error of law and its decision was not supported by competent, material, and substantial evidence, we reverse.

I. FACTS

Menard filed a petition to appeal the ad valorem property tax assessments for tax years 2012, 2013, and 2014 for property located in the City of Escanaba. Escanaba made the following valuations of the property: (1) in 2012 the true cash value (TCV) was $7,815,976; (2)

in 2013 the TCV was $7,995,596; and (3) in 2014 the TCV was $8,210,938. Menard contended that the TCV for each year was only $3,300,000.

In support of its position, Menard submitted a valuation appraisal prepared by Joseph Torzewski, a commercial real estate appraiser. Torzewski opined in his report that the property's highest and best use (HBU) was "for continued use of the existing improvements as a free-standing retail building." Torzewski stated that he appraised the "fee simple interest" in the subject property.

Torzewski reached his opinion on the property's TCV by developing the sales-comparison and income approaches to valuation.[1] In his sales-comparison approach, Torzewski provided eight comparable sales. Because he found no other big-box stores in the Upper Peninsula, he used buildings primarily located in southeast Michigan. The record contains the following information on the eight comparables used by Torzewski:

1. Comparable 1 was a former Home Depot built in 2006, located in Holland, Michigan, and had 103,000 square feet. The structure was sold in 2014. The record does not contain any information on the current or intended future use of the building, but does state that deed restrictions limit its ability to be used as a retail space;

2. Comparable 2 was a former Circuit City built in 1996, located in Westland, Michigan, and had 63,686 square feet. The structure was sold in 2013 to the City of Westland which turned it into a city hall;

3. Comparable 3 was a former Wal-Mart built in 1989, located in Alma, Michigan, and had 122,790 square feet. The building was sold in 2012 for redevelopment as industrial property. The property contained deed restrictions that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet;

4. Comparable 4 was a former Sam's Club built in 1986, located in Madison Heights, Michigan, and had 113,262 square feet. The building was sold in 2012 for redevelopment as industrial property;

5. Comparable 5 was a former Wal-Mart built in 1995, located in Auburn Hills, Michigan, and had 151,017 square feet. The building was sold in 2011 for redevelopment as industrial property. The property contained deed restrictions that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet;

[1] The parties stipulated that, because the subject property was not income-producing, the income approach was inapplicable. In its final opinion and judgment, the tribunal gave no weight to the income approach. That decision has not been challenged on appeal.

6. Comparable 6 was a former furniture store built in 1986, located in Flint, Michigan, and had 53,474 square feet. The building was sold in 2010 and continues to function as a furniture store;

7. Comparable 7 was a former Kroger built in 1981, located in Dearborn, Michigan, and had 55,474 square feet. The building was sold in August 2010, but no detail is contained in the record about the current or future use of the building other than that it is intended for future retail use; and

8. Comparable 8 was a former Wal-Mart built in 1993, in Monroe, Michigan, and had 130,626 square feet. The building was sold in 2009 to be divided into multi-tenant space with current tenants being Dunham's Sports and Hobby Lobby. The property contained deed restrictions that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet.

In his valuation report, Torzewski mentioned that Comparable 1 had deed restrictions. He did not reference deed restrictions with regard to any of the other comparables, nor did he make any adjustments for the existence of deed restrictions. At the hearing, however, Torzewski testified that most of the properties contained deed restrictions. Specifically, he acknowledged that Comparables 1, 3, 5, and 8 had use restrictions, but Comparables 6 and 7 did not.[2] He testified that he took the deed restrictions into account, explaining that in selecting comparables, he would inquire if the deed restrictions affected the sales price. He stated that if he could not get that information he would not use the sale as a comparable. He testified that "in many cases" deed restrictions did not "have any effect on the sales price because the restrictions that were in place aren't anything really out of the ordinary or would affect the secondary user of the property, so, therefore, we—in the conditions of the sales adjustment . . . grid there are no adjustments for that condition of sale factor." Torzewski explained that it was "pretty common for build-to-suit owners" to put deed restrictions on their property "to exclude any sort of use that might be a competitive use." He testified that, after speaking to the brokers, sellers, and buyers, he was satisfied that the deed restrictions had no impact on the price obtained for the comparables used in the valuation for Menard. However, Torzewski's appraisal report showed that Comparables 6 and 7, the ones he noted had no restrictions, had the highest selling price per square foot.

After making adjustments for other differences in the comparables, Torzewski concluded that the subject premises should be valued at $20 per square foot for tax years 2012, 2013, and 2014.

Diana Norden, the city assessor for Escanaba, opined that the comparables used by Torzewski were "not great." She testified that, after researching Menard's comparables, she learned: Comparable 1 was subject to a building easement and had use restrictions, Comparable 2 was not a freestanding unit but had multiple storefronts, Comparable 3 looked like someone

[2] According to Torzewski, the "larger, more big-box-type stores did have some deed restrictions in place" as opposed to "a couple of the smaller [comparables]," which did not have restrictions.

buying themselves out of a lease, Comparable 4 had been foreclosed on, and Comparables 5 and 8 had use restrictions. Criticism of Menard's comparable selection was also offered by Miles Anderson, an expert in appraisal review. He, like Norden, testified that Comparable 1 had use restrictions. More generally, he criticized Menard's appraisal for failing to state, explain, or make adjustments for use restrictions on the sales comparables.

In support of its assessment of value, Escanaba submitted a valuation summary prepared by Norden. Norden primarily used the cost-less-depreciation approach to value the property. She testified that she used the cost-less-depreciation approach because there were insufficient comparable sales and because the building being valued was a newer construction. She opined that properties with deed restrictions should not be compared to the subject property, which had no use restrictions in place. She testified that she adjusted the value for depreciation, but that she did not adjust for functional obsolescence. Norden, who was admitted as an expert in appraisal, opined that there was no functional obsolescence in the property because, if purchased for its existing use, other retailers would use the components of the existing building.

By contrast, Torzewski testified that he did not use the cost-less-depreciation approach because functional obsolescence is built into built-to-suit big-box stores, and because, in a down market, a property like the subject property would have external obsolescence. He testified that both the functional and external obsolescence need to be accounted for in depreciation under the cost-less-depreciation approach, but that with this building, accounting for the obsolescence would be difficult. Torzewski also stated that the buyers of similar buildings do not use the cost-less-depreciation approach and that owners of properties like the subject property are typically not concerned with reselling, but are instead looking to maximize their floor space. Torzewski did not, however, identify any specific features of the building that created functional obsolescence, nor did he identify any economic factors in the subject market that would account for external obsolescence.

Following a hearing, the tribunal concluded that the TCV for 2012 was $3,325,000, the TCV for 2013 was $3,490,000, and the TCV for 2014 was $3,660,000. In its reasoning, the tribunal concluded that Escanaba's cost-less-depreciation approach should be given no weight because Norden did not account for functional or external obsolescence. The tribunal also credited Menard's assertion that the cost-less-depreciation approach should not be used to value the subject property because (1) functional obsolescence is difficult to calculate and (2) first-generation users are concerned with optimizing sales, not with optimizing market value to the property. The tribunal also concluded that Norden's sales-comparison approach did not provide sufficient data for the tribunal to arrive at an independent conclusion because Norden did not make any analytical adjustments for differences in the properties. By contrast, the tribunal concluded that the sales-comparison approach advanced by Menard was persuasive and was meaningful to an independent determination of market value. On reconsideration, the tribunal specifically found that the deed restrictions in Menard's comparables did not require an adjustment because it found credible Torzewski's testimony that the deed restrictions had no effect on the sales price of the deed-restricted comparables.

II. STANDARD OF REVIEW

In the absence of fraud, our review of Tax Tribunal determinations "is limited to determining whether the tribunal made an error of law or adopted a wrong legal principle." *Meijer, Inc v City of Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000). "The tribunal's factual findings are upheld unless they are not supported by competent, material, and substantial evidence." *Id*. Substantial evidence is "evidence that a reasoning mind would accept as sufficient to support a conclusion." *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1995). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). "Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal." *Meijer, Inc*, 240 Mich App at 5. The entire record, "not just the portions that support the agency's findings," must be reviewed when evaluating the tribunal's final determination. *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). Further, cursory rejection of evidence is also erroneous. *Jones & Laughlin Steel Corp*, 193 Mich App at 354.

The petitioner, Menard, bears the burden of proving the true cash value (TCV) or the property. MCL 205.737(3).

> The burden of proof encompasses two concepts: "(1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin Steel Corp*, [193 Mich App at 354-355]. Nevertheless, because Tax Tribunal proceedings are de novo in nature, the Tax Tribunal has a duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp*[*v City of Ecorse*, 227 Mich App 379, 409; 576 NW2d 667 (1998)]. Thus, even when a petitioner fails to prove by the greater weight of the evidence that the challenged assessment is wrong, the Tax Tribunal may not automatically accept the valuation on the tax rolls. *Id*. at 409. Regardless of the method employed, the Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485–486, 502; 473 NW2d 636 (1991). [*President Inn Props, LLC v City of Grand Rapids*, 291 Mich App 625, 631; 806 NW2d 342 (2011).][3]

[3] Menard asserts that Escanaba, as the appellant, now bears the "burden of proof" in establishing the TCV of the subject property. This is not strictly accurate. On appeal, in order for the appellant to receive relief, it has the burden to demonstrate that the lower court erred as governed by the relevant standard of review. However, at the tribunal, initially and on remand, the burden of proof to establish TCV is on the petitioner. *President Inn Props*, 291 Mich App at 631. Menard relies on *Drew v Cass Co*, 299 Mich App 495; 830 NW2d 832 (2013) in suggesting that the "burden of proof" is on the taxing authority when it is the appellant. Indeed, in *Drew*, we stated, "[t]he appellant bears the burden of proof in an appeal from an assessment, decision, or order of the Tax Tribunal." *Id*. at 499 (quotation omitted). In that case, however, the petitioner,

III. APPROACHES TO VALUATION

"The Tax Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes*, 227 Mich App at 389. TCV "means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale . . . or forced sale." MCL 211.27(1). TCV is the equivalent of the property's fair market value. *Great Lakes*, 227 Mich App at 389.

"[T]o determine true cash value, *the property must be assessed at its highest and best use*." *Huron Ridge, LP v Ypsilanti Twp*, 275 Mich App 23, 33; 737 NW2d 187 (2007) (emphasis added). The concept of "highest and best use . . . recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay for it." *Great Lakes*, 227 Mich App at 408. "The concept . . . is fundamental to the determination of true cash value." *Detroit Lions, Inc v Dearborn*, 302 Mich App 676, 697; 840 NW2d 168 (2013). "Highest and best use" is defined as " 'the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.' " *Id*., quoting *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005). The tribunal is required to make a determination of a subject property's highest and best use. *Detroit Lions*, 302 Mich App at 697.

The parties agree that the highest and best use of the property is as an owner-occupied freestanding retail building.[4] Their disagreement lies in the valuation methodologies to be

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not the respondent, was the appellant. *Id*. at 496. The *Drew* Court cited *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005) in support of the proposition. The petitioner, not the respondent, was the appellant in *ANR Pipeline*. *Id*. at 191. The *ANR Pipeline* Court cited *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 463; 462 NW2d 765 (1990) in support of the proposition. In *Dow Chem*, however, the petitioner was also the appellant. *Dow Chem Co*, 185 Mich App at 459. The *Dow Chem* Court cited *Holloway Sand & Gravel Co Inc v Dep't of Treasury*, 152 Mich App 823, 831 n 2; 393 NW2d 921 (1986), another case where the appellant and the petitioner were the same party. *Id*. at 831. Critically, the *Holloway Sand & Gravel* Court relied on MCL 205.7, which, at the time had already been repealed by 1980 PA 162. Prior to its repeal, MCL 205.7 provided that "[t]he burden of proof in any appeal from any assessment, decision or order shall rest with the appellant," but, critically, the statute referred to the appellant and the taxing authority as separate entities. See 1941 PA 122, § 7, now codified at MCL 205.22. Accordingly, we conclude that the statement in *Drew* that the burden of proof is on the appellant does not shift the burden to establish TCV from petitioner to respondent. Rather, in its proper context, it is apparent that the reference to "appellant" in *Drew* and its progeny actually refers to petitioner.

[4] Escanaba and the amicus argue that the tribunal failed to make an explicit determination of the property's HBU. However, we find that such a finding is implicit in the tribunal's decision, which recounted in the findings of fact that the parties did not dispute the HBU. Given that the

employed and the data relevant to the valuation. The three valuation methodologies that have been "found acceptable and reliable by the Tax Tribunal and the courts" are the cost-less-depreciation approach, the sales-comparison or market approach, and the capitalization of income approach. *Meadowlanes Dividend Housing Ass'n*, 437 Mich at 484-485. While, if possible, all three methods should be used, the "final value determination must represent the usual price for which the subject property would sell" irrespective of the specific method employed. *Id.* at 485.

As noted, the parties and the tribunal agreed that the income approach does not apply in this case. The tribunal also rejected the cost-less-depreciation approach advanced by Escanaba, but found the values in Menard's sales-comparison approach to be meaningful.

A. SALES-COMPARISON APPROACH

We first examine whether the tribunal's reliance on the sales-comparison approach advanced by Menard was supported by competent, material, and substantial evidence.

Menard owns a fee simple interest in the subject property. The property, as it currently exists, is not subject to any use restrictions. However, half of the comparables in Torzewski's sales-comparison valuation contained deed restrictions that limited the use of the properties for retail purposes, thereby preventing sale of an entire fee simple interest in the property. Torzewski failed to mention all the deed restrictions in his valuation report, did not make any adjustments for their existence, and, during his testimony, he insisted that the restrictions did not affect the value of the comparables because the parties involved in the comparable sales told him that the restrictions did not affect the sale price. The tribunal accepted Torzewski's testimony and used the deed-restricted comparables in its determination of value. We conclude that the tribunal's finding was based on an error of law and was not supported by competent, material, and substantial evidence.

In *Helin v Grosse Pointe Twp*, 329 Mich 396, 407-408; 45 NW2d 338 (1950), our Supreme Court recognized that deed restrictions in property that prohibited its use for an "apartment house, multiple residence, or institutional purposes" would have an effect on the value of the property. Accordingly, it would be error to fail to consider "deed restrictions in establishing assessments[.]" *Kensington Hills Dev v Milford*, 10 Mich App 368, 372; 159 NW2d 330 (1967). This Court emphasized further in *Lochmoor Club v Grosse Pointe Woods*, 10 Mich App 394, 397-398; 159 NW2d 756 (1968), that all factors, including "restrictions imposed" on property must be considered in determining a property's TCV.

Although Torzewski testified that he considered the deed restrictions, the record is insufficient to support his assertion that they had no effect on the sales price for the restricted comparables. His testimony is that he consulted the brokers, sellers, and buyers of the comparables. Thus, that testimony is only sufficient to establish that *to the parties involved in the actual transaction*, the deed restrictions did not affect the sales price they were willing to

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matter was not contested and that the tribunal recognizes the agreed-upon HBU, we conclude that the tribunal did not err by not expressly stating the HBU.

pay. In other words, the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple.

However, in assessing TCV, the property "must be assessed at its highest and best use," *Huron Ridge*, 275 Mich App at 33, which in this case is as an owner-occupied freestanding retail building. Deed restrictions that limit the ability of prospective buyers to use the comparable properties for the subject property's HBU necessarily limit, if not eliminate, the willingness of those buyers to purchase the restricted property. Those who would be interested in buying the property *with restrictions* would need to make modifications to convert the building from retail to something else, like industrial use. Given the need to convert, the buyers would necessarily pay a lower price.

For the same reasons, the anti-competitive nature of the deed restrictions means that the deed-restricted comparables could not be sold for their HBU. The potential buyers of the comparables were therefore limited to buyers willing to accept the use restrictions. Further, because of the prevalence of the self-imposed deed restrictions on big-box stores, there is essentially no market for big-box stores being sold for the HBU of the subject property. Thus, half of Torzewski's comparables were not evaluated at the HBU of the subject property because the deed restrictions expressly prohibited their use as a freestanding retail center.

On this record, there is no evidence to account for the impact of the deed-restricted properties being sold for purposes other than the HBU of the subject property. It is plain that no adjustments were taken for this major difference in the subject property and the restricted comparables. Accordingly, we conclude that the tribunal erred in finding Menard's sales-comparison approach meaningful to its determination of the subject property's TCV. The tribunal did not value the subject property at its HBU, an owner-occupied freestanding retail building, but instead valued it as a former owner-occupied freestanding retail building that could no longer be used for its HBU and could best be used for redevelopment for a different use. In doing so, the trial court made an error of law by failing to value the subject property at its HBU.

B. COST-LESS-DEPRECIATION APPROACH

The tribunal rejected the cost-less-depreciation approach advanced by Escanaba. However, because the deed restrictions imposed by other big-box store owners drastically limited the actual market for such properties, it is appropriate to look at the cost-less-depreciation approach.[5]

[5] Menard argues that use of the sales-comparison approach over the cost-less-depreciation approach is supported by this Court's two recently issued unpublished opinions on the valuation of similar "big-box" stores in *Lowe's Home Ctrs v Twp of Marquette*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket Nos. 314111 and 314301), and *Lowe's Home Ctrs Inc v Grandville*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket No. 317986). We disagree. In those cases, the salient issue was whether, using the sales-comparison approach, comparables should be to the fee simple

"The adjusted-cost-of-reproduction-less-depreciation method is most suitable for industrial facilities for which no market, an inadequate market, or a distorted market exists." *Tatham v Birmingham*, 119 Mich App 583, 591; 326 NW2d 568 (1982). Here, although there is evidence of a market for big-box stores when they are sold for secondary purposes, there is limited evidence as to whether there is a market for big-box stores at the subject property's HBU. Instead, Torzewski testified that large big-box stores commonly had deed restrictions for anti-competitive purposes, and Norden testified that she could not locate a sufficient number of unencumbered comparables to make adjustments in her sales-comparison approach. As such, the cost-less-depreciation approach is appropriate to value the TCV of the property.

In *Clark Equip Co v Leoni*, 113 Mich App 778, 782-783; 318 NW2d 586 (1982), this Court approached the problem of determining the TCV of an industrial facility. In that case, all of the property's appraisers determined that the industrial property's current use was "also its highest and best use." *Id*. at 782. This Court described the difficulty in determining the TCV to such property and the appropriate solution as follows:

> The reality is that these types of industrial plants are rarely bought and sold . . . . However, as we construe MCL 211.27; MSA 7.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the functions currently performed in the subject plant, said buyer would consider purchasing the subject property, the usual selling price can be based upon value in use. . . . To construe MCL 211.27; MSA 7.27, as requiring the taxing unit to prove an *actual* market for a property's existing use would lead to absurd undervaluations. Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. . . . It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost premised on value in use because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists. [*Id*. at 784-785 (emphasis in original).]

In other words, *Clark* provides that (1) when the HBU of the property is its existing use and (2) when because the property is built-to-suit there would be little to no secondary market for the

alone or the fee simple plus the value to an occupier of an already existing leasehold or operating business. We determined in both cases, over the objection of the taxing authority, that because the subject premises was owner occupied, it must be valued as if vacant and available. *Lowe's Home Ctrs v Twp of Marquette*, unpub op at 1, and *Lowe's Home Ctrs Inc v Grandville*, unpub op at 7. In other words, those cases held, as do we, that what must be valued is what would actually be sold. In those cases, the sales would be of the property without an existing lessee or operating retail business. In this case, what is being valued is the property without deed restrictions limiting its use.

property where it would still be used at its HBU, then the strict application of the sales-comparison approach would undervalue the property, so the cost-less-depreciation approach is more appropriate.

In *Great Lakes*, this Court elaborated that "valuation can be determined strictly on a hypothetical basis, with the hypothetical buyer looking at the costs of building a new facility to determine the usual price of an existing facility even if a real buyer would not consider building such a facility." *Great Lakes*, 227 Mich App at 403. However, the hypothetical buyer need not "be presumed to have considered building an industrial facility as an alternative to purchasing an existing one when no such facility would be built *and* that hypothetical buyer has the ability to see what is occurring in the marketplace of existing facilities." *Id*. (emphasis in original). Thus, *Great Lakes* states that the holding of *Clark* should not be applied when (1) no facility like the subject facility would actually be built, and (2) a buyer has the ability to see what is occurring in the marketplace of existing facilities. In the present case, there is no indication that "big-box stores" like the subject are not being built. Additionally, because such big-box stores are not typically sold on the marketplace for use as "big-box stores," a buyer does not have the ability to see what is occurring in the marketplace of existing facilities. Thus, the limitation in *Great Lakes* does not apply and this case is governed by *Clark*.

In the present case, given that multiple valuation methods should be used when possible, *Meadowlanes*, 437 Mich at 485, and that the analysis in the first issue shows that the comparables that the tribunal used in this case were not appropriate, the tribunal committed error in refusing to consider Escanaba's evidence under the cost-less-depreciation approach. The evidence demonstrates that owner-occupied freestanding retail buildings like the subject, which Menard describes as "big-box stores," have many similar qualities to the industrial properties that this Court addressed in *Clark*. Both are constructed or built to order to conform to the specifications of the purchasing user and are rarely sold on the open market for their current use. Similar to the plant at issue in *Clark*, there is no indication in the record that the subject premises is not a new, modern facility capable of fully functioning as a freestanding retail center just as the industrial center in *Clark* was modern enough for continued use of the industrial purpose it was designed for. *Clark*, 113 Mich App at 782-783. Therefore, like the industrial plant in *Clark*, it would not be appropriate to value the subject property significantly less than its replacement costs simply because owner-occupied freestanding retail spaces are rarely bought or sold for use as owner-occupied freestanding retail spaces on the open market. Like the industrial plant in *Clark*, the subject premises is well-suited for its current use and would be considered by a hypothetical buyer who wished to own a freestanding retail building in accordance with the subject's capabilities, and, therefore, the property must be valued "as if there were such a potential buyer, even if, in fact, no such buyer . . . actually exists." *Id*. at 785.

Additionally, Menard's and the tribunal's reliance on the concept of functional obsolescence to discredit using the cost-less-depreciation approach is misplaced. The tribunal rejected the cost-less-depreciation approach advanced by Escanaba in part because it concluded

that Norden failed to adjust for functional obsolescence.[6] Norden, however, testified that she did not adjust for functional obsolescence because there was none in the subject property. She explained that, considering the property's HBU, the same building would be built by Menard if it were to build a new store. Further, she testified that the existing building would be used in essentially the same fashion if a competitor were to purchase the property. Although Torzewski testified that it would be difficult to value functional obsolescence, he did not identify any functional obsolescence presently in the subject property, other than to suggest that the building was automatically functionally obsolete the moment it was completed. He also suggested in general terms that there was external obsolescence because the market for big-box stores was a "down market" because there was little to no demand for the properties.

There was no evidence in the record of any deficiency in the subject premises that would inhibit its ability to properly function as an owner-occupied freestanding retail building. The functional obsolescence to which Menard refers appears to be the fact that, due at least in part to self-imposed deed restrictions that prohibit competition, such freestanding retail buildings are rarely bought and sold on the market for use as such but are instead sold to and bought by secondary users who are required to invest substantially in the buildings to convert them into other uses, such as industrial use. However, as stated in *Clark*, to read MCL 211.27 "as requiring the taxing unit to prove an *actual* market for a property's existing use would lead to absurd undervaluations." *Clark*, 113 Mich App at 785 (emphasis in original). Therefore, the tribunal erred by failing to consider evidence under the cost-less-depreciation approach.[7]

IV. CONCLUSION

[6] To determine the present TCV of property under the cost-less-depreciation approach, depreciation must be subtracted from the replacement costs. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 755; 378 NW2d 590 (1985). Depreciation includes functional obsolescence. *Id.* "Functional obsolescence is a loss in value brought about by failure or inability to deliver full service." *Id.* It can include loss of value due to "shortcomings or undesirable features contained within the property itself. . . . such as poor floor plan, inadequate mechanical output, or functional inadequacy or superadequacy due to size or other characteristics." *Id.*

[7] Escanaba also argues that the tribunal's decision should be reversed because it accepted a non-authoritative definition of the phrase "big-box" store. Menard's expert relied on a definition of "big-box store" from the Dictionary of Real Estate Appraisal, whereas Escanaba's expert in appraisal review relied on definitions from Investopedia, Wikipedia, and businessdictionary.com. However, the closest the tribunal came to addressing the debate over the definition of the term "big-box" store was when it criticized Escanaba's expert's use of "internet definitions." The tribunal did not, however, adopt the definition of "big-box" store advocated by Menard or base its conclusions regarding the sales-comparison approach or the cost-less-depreciation approach on Menard's definition of "big-box" store.

The tribunal committed an error of law requiring reversal when it rejected the cost-less-depreciation approach and adopted a sales-comparison approach that failed to fully account for the effect on the market of the deed restrictions in those comparables. Given this error, and the fact that there is little if any evidence in the record as to the impact of the deed restrictions on the comparables, we conclude that it is inadequate to simply remand to the tribunal for a new determination as to value. Instead, on remand, the tribunal shall take additional evidence with regard to the market effect of the deed restrictions. If the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's HBU, then the comparables should not be used. The tribunal shall also allow the parties to submit additional evidence as to the cost-less-depreciation approach.[8] After allowing the parties the opportunity to present additional testimony in light of the deficiencies identified in this opinion, the tribunal shall make an independent determination of the property's TCV using correct legal principles. In doing so, the tribunal must "apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes*, 227 Mich App at 389.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro

[8] As noted above, the parties agree that the income approach is inapplicable.

Exhibit B

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Menard Inc.,
Petitioner,

v

MTT Docket Nos. 441600
and 14-001918

City of Escanaba,
Respondent.

Tribunal Judge Presiding
Marcus L. Abood

FINAL OPINION AND JUDGMENT

Petitioner, Menard Incorporated, appeals the ad valorem property tax assessment levied by Respondent, city of Escanaba, against the real property owned by Petitioner for the 2012, 2013, and 2014 tax years.

A hearing was held on August 14, 2014, to resolve the real property tax dispute. Carl Rashid, Jr., attorney at Dykema Gossett, PLLC, and Paul Bach, at Paradigm Tax Group, LLC appeared on behalf of Petitioner. Russell W. Hall, attorney at DeGrand, Reardon & Hall, PC, appeared on behalf of Respondent. Joseph L. Torzewski, MAI, was Petitioner's valuation witness. Daina Norden and Myles Anderson were Respondent's valuation witnesses.

SUMMARY OF JUDGMENT

The subject property's 2012, 2013, and 2014 True Cash Values (TCVs), Assessed Values (AVs), and Taxable Values (TVs) as determined by Respondent are:

Parcel No. 051-420-2825-100-006

	Respondent		
Year	TCV	SEV	TV
2012	$7,815,976	$3,907,988	$3,907,988
2013	$7,995,596	$3,997,798	$3,997,798
2014	$8,210,938	$4,105,469	$4,105,469

Petitioner's contentions are:

Parcel No. 051-420-2825-100-006

	Petitioner		
Year	TCV	SEV	TV
2012	$3,300,000	$1,650,000	$1,650,000
2013	$3,300,000	$1,650,000	$1,650,000
2014	$3,300,000	$1,650,000	$1,650,000

The Tribunal's conclusions are:

Parcel No. 051-420-2825-100-006

Year	TCV	SEV	TV
2012	$3,325,000	$1,662,500	$1,662,500
2013	$3,350,000	$1,675,000	$1,675,000
2014	$3,660,000	$1,830,000	$1,830,000

GENERAL PROPERTY DESCRIPTION

The subject property is known as a Menard store, and is located at 3300 Ludington Street, in the City of Escanaba, Delta County, Michigan. The building contains 166,196 square feet on 18.35 acres. It is a big box construction built to suit for the Menard's store model.

SUMMARY OF PETITIONER'S CASE

Petitioner presented testimony from its appraiser, Joseph L. Torzewski, MAI. Mr. Torzewski has appraised 20-30 big box stores including Art Van, Home Depot, Hobby Lobby and Menard on behalf of property owners, for tax appeals. Based on his education and experience, the Tribunal accepted Mr. Torzewski as an expert real estate appraiser.

In support of its value contentions, Petitioner offered the following exhibits, which were admitted into evidence:

P-1: Appraisal Report prepared by Joseph L. Torzewski.

Petitioner acknowledged a typographical error within its appraisal report. Specifically, the issued report date is February 25, 2014 and not February 25, 2013. Mr. Torzewski was assisted by Talia Mitchell in the completion of the appraisal report.

Mr. Torzewski described the regional overview, market analysis and neighborhood analysis for the subject property. (TR, pp 21-25) In addition, he analyzed traffic counts for the subject location. (TR, pp 117-118) From this information, further analysis was conducted regarding market inventory i.e., number of buildings, total available square footage, absorption, vacancy rates, new construction, etc. "It tells us that there's not a whole lot of demand for retail space based on the absorption – the negative absorption that's been going on in Escanaba over the – several years prior to the subject property's appraisal." (TR, p 26) Petitioner contends there is little demand for big box retail space once the build-to-suit, owner-occupant vacates the building. Further, the demand factors for big box stores are similar throughout Michigan. (TR, p 28)

Mr. Torzewski testified to the difference between a fee simple interest and a leased fee interest. The real property is being appraised, not the occupancy of the property. This analysis was performed to distinguish between first-generation built-to-suit owners versus second-generation tenants. He contends that following trends illustrate ". . . that first-generation space typically sells for a much higher price because it's based on the built-to-suit cost involved in most cases, and it's a whole different - - it's a whole different ball game compared to just a general fee simple, vacant and available space." (TR, p 29) The subject property was appraised in fee simple interest; the property was appraised as if unleased, vacant, and available for sale. Secondary users of these big box stores demolish the improvements for redevelopment of the

underlying land or purchased for alternative uses i.e., industrial development or mult-tenant retail. (TR, pp 121-122)

Mr. Torzewski described the highest and best of the subject property relative to the fee simple, owner-occupied elements. He identified the three approaches to value as the income approach, sales comparison approach and income capitalization approach. Further, he identified the LoopNet, MLS, assessors, brokers and third-party appraisers as data sources for this appraisal assignment.

Mr. Torzewski considered various areas and spaces surrounding the primary subject building. He noted the main structure is the Menard's warehouse. Other areas that were not included in the overall gross building area or analysis were the mezzanine, loading dock, special order area (supply garage), garden center, overhang canopy (shipping), and guard station.

Mr. Torzewski researched and analyzed eight comparable sales for the sales comparison approach to value. He contends that deed restrictions were investigated in each of the comparable sales.

> One of the questions we always ask, particularly in a case like this where we know going in that a lot of the sales would have some sort of a deed restriction attached, is we ask did these deed restrictions have any effect on the sales price. And we try to get that information. If we can't get that information, we typically don't utilize that property as a sales comparable. There are many cases where they would have deed restrictions attached but they didn't have any effect on the sales price because the restrictions that were in place aren't anything really out of the ordinary or would affect the secondary user of the property, so, therefore, . . . there are no adjustments for that condition of sale factor. (TR, pp 47-48)

Mr. Torzewski explained that all of his comparable sales had some type of deed restrictions but none that impacted their sale prices. (TR, pp 63-66)

Mr. Torzewski explained all other transactional and physical characteristic adjustments made to his comparable sales. (TR, pp 48-54) In testimony, he revised his true cash values from

$3,400,000 to $3,300,000 for each year under appeal. This was based on the parties' stipulation to a gross building area of 166,196 square feet for the subject.

Through further testimony, Petitioner contends "other considerations" were given to additional sales of big box retail stores as well as additional local transactions (Petitioner's Exhibit P-1, pp 42-43) These additional sales were offered as further support in the comparative sales analysis.

Mr. Torzewski did not develop or communicate a cost approach to value for this appraisal assignment. He contends that the cost approach is not relevant or necessary because potential buyers do not place any reliance on this approach. Secondly, he testified that the functional obsolescence associated with built-to-suit, big box stores as well as external obsolescence is difficult to analyze properly. (TR, p 60) For these reasons, the cost approach was not utilized by Petitioner.

Mr. Torzewski developed and communicated an income approach to value. He submits that this approach was used as a "test of reasonableness for the sales comparison approach more than anything." (TR, p 61)

SUMMARY OF RESPONDENT'S CASE

Respondent presented testimony from its assessor, Daina Norden. She has been the assessor for the city of Escanaba since January of 2011. Prior to that employment, she worked for the Delta County Equalization Department for six years. Based on her education and experience, the Tribunal accepted Ms. Norden as an expert in real estate assessing and mass appraisal.

Respondent presented testimony from its review appraiser, Miles Anderson, SRA. Mr. Anderson was the assessor for the city of Escanaba for 20 years. Overlapping that timeframe he

was the part-time assessor for Wells Township. His employment as an assessor and as a real estate appraiser covers approximately 37 years. Mr. Anderson has reviewed hundreds of appraisals in a professional capacity. He has testified twice before the Michigan Tax Tribunal in the 1990s. Based on his education and experience, the Tribunal accepted Mr. Anderson as an expert real estate review appraiser.

In support of its value contentions, Respondent offered the following exhibits, which were admitted into evidence:

R-1: Sales (deed) Information pertaining to SRR Sales Comparison No. 1.
R-2: Sales (deed) Information pertaining to SRR Sales Comparison No. 2.
R-3: Sales (deed) Information pertaining to SRR Sales Comparison No. 3.
R-4: Sales (deed) Information pertaining to SRR Sales Comparison No. 4.
R-5: Sales (deed) Information pertaining to SRR Sales Comparison No. 5.
R-6: Sales (deed) Information pertaining to SRR Sales Comparison No. 6.
R-7: Sales (deed) Information pertaining to SRR Sales Comparison No. 7.
R-8: Sales (deed) Information pertaining to SRR Sales Comparison No. 8.
R-9: Respondent's Valuation Disclosure prepared by Daina Norden.
R-10: Respondent's Review Appraisal prepared by Miles Anderson.
R-11: Subject Building Dimensions and Square Footage.

Daina Norden, Assessor, described the Escanaba market area. (TR, pp 129-131) She testified, "I used the cost approach, which is an approved method by the State of Michigan to valuate property using the fee simple approach." (TR, p 144) As part of her cost approach, Ms. Norden described the subject property record card including the BS&A cost calculations (TR, pp 144-152)

Ms. Norden developed and communicated a sales comparison approach within her valuation disclosure. However, she contended that she was not comfortable with this approach based on the lack of sales. (TR, p 155)

Lastly, Ms. Norden researched Petitioner's eight comparables for deed information and restrictions. (TR, pp 157-163)

Respondent's 2nd witness, Miles Anderson, review appraiser, described his process for reviewing Petitioner's appraisal report. Specifically, Mr. Anderson contended that he performed a limited desk review of Petitioner's appraisal report. This is a review of the quality of Petitioner's work product. Mr. Anderson's research included the definition of a big box store which is noted as greater than 50,000 square feet. Mr. Anderson contends Petitioner's appraisal report lacks supporting data for the comparable adjustments. To test Petitioner's adjustments, Mr. Anderson converted the percentage adjustments into dollar adjustments. Based on the converted dollar adjustments, Respondent contends none of the comparable sales comes up to Petitioner's conclusions of value. (TR, p 215) Overall, Mr. Anderson disagrees with Petitioner's valuation disclosure because of a lack of explanatory narration for the adjustments.

Respondent's review appraiser contends Petitioner's sales data within the market analysis (Petitioner's Exhibit P-1, p 21) only identifies 6 sales that support the definition of a big box store with at least 50,000 square feet. Likewise, Mr. Anderson argues that Petitioner's sales data on page 22 only includes three sales that support the definition of a big box store with at least 50,000 square feet. Lastly, Mr. Anderson asserts that page 23 of Petitioner's appraisal report only identifies 7 sales that support the definition of a big box store with at least 50,000 square feet.

FINDINGS OF FACT

1. The subject property is located at 3300 Ludington Street, City of Escanaba, and within Delta County.
2. The subject parcel code number is 051-420-2825-100-006 and is zoned F, Light Manufacturing.
3. The parties submitted a stipulated statement of facts on the day of the hearing.
4. The parties stipulated that "the subject building contains 166,196 square feet on the 1st floor, per Respondent's Exhibit 11, attached hereto."
5. The parties stipulated that "the subject property has a total land area of 18.35 acres."
6. The parties stipulated that "the occupant of [the] subject property should not influence the market value of the property."

7. The parties stipulated that "the subject property is not an income-producing property, thus the income approach is not given weight in the final conclusion of value."
8. The parties stipulated that "the subject property is located in the Escanaba Core Based Statistical Area (CBSA)."
9. The parties stipulated that "the total population for the Escanaba CBSA is 39,069 for Delta County. The total population for Escanaba is 12,616 (2010 Census)."
10. The parties stipulated that "the subject property is located on the north side of Ludington Street, west of North 30th Street."
11. The parties stipulated that "the subject property is located near the western edge of the developed area of Escanaba."
12. The parties stipulated that "the unemployment rates in the Escanaba CBSA decreased from 10.1% in 2011 to 8.9% in 2013."
13. The parties stipulated that they "have appraised the subject property as a fee simple interest."
14. Both parties valued the subject property as a single-tenant retail space.
15. The subject property was constructed in 2008 as a built-to-suit, owner-occupied big box store.
16. Petitioner's valuation disclosure was submitted in the form of a narrative appraisal report prepared by Joseph L. Torzewski, Certified General Real Estate Appraiser in the state of Michigan.
17. Petitioner's appraiser inspected the subject property on February 19, 2014. (TR, p 18)
18. Petitioner's appraiser relies on the definition of a big box store from the Appraisal Institute, *Dictionary of Real Estate Appraisal* (Chicago: 5th ed, 2010), p 229.
19. Petitioner's market analysis includes retail spaces in Delta County. (Petitioner's Exhibit P-1, p 18)
20. Petitioner's market analysis includes a stabilized occupancy for Delta County and the city of Escanaba. (Petitioner's Exhibit P-1, p 19)
21. Petitioner's market analysis includes rental rates of Metropolitan Detroit Big Box Retail. (Petitioner's Exhibit P-1, p 20)
22. Petitioner's market analysis includes 19 leased fee transactions of build-to-suit, first generation retail space. (Petitioner's Exhibit P-1, p 21)
23. Petitioner's market analysis includes 16 leased fee transactions of 2nd generation retail space. (Petitioner's Exhibit P-1, p 22)
24. Petitioner's market analysis includes 30 fee simple transactions. (Petitioner's Exhibit P-1, p 23)
25. Petitioner's appraiser analyzed the traffic counts in the subject market area. "So there's a drop-off of about 50 percent of traffic between the commercial – between the traffic on 2 to the north side of Ludington Street and that where the subject is located. . . . At the subject property the traffic counts for 2012 were 12,783, and to the north along US-2 the traffic counts were as high as almost 28,000 – 27,917." (TR, pp 117-118)
26. Petitioner's appraiser considered various areas and spaces surrounding the subject's main building. (TR, pp 44-46)
27. Petitioner's appraiser considered, analyzed and applied various adjustments to his comparable sales. Mr. Torzewski considered deed restrictions and corresponding adjustments to the comparable sales. (TR, pp 47, 63-66)

28. Petitioner's appraiser considered, analyzed and adjusted the subject's other areas/spaces in the sales comparison adjustment grid. (TR, p 71)
29. Petitioner's appraisal report includes the income and sales comparison approaches to value for the years under appeal.
30. Petitioner's appraiser did not develop the cost approach because of the difficulty in determining the functional and external obsolescence attributable to the subject property. (TR, p 60)
31. Petitioner's sales comparison approach includes eight sales for a direct comparative analysis. The sales are located in Holland, Westland, Alma, Madison Heights, Auburn Hills, Flint, Dearborn and Monroe.
32. Petitioner's appraiser previously appraised its comparable sale 4. (TR, p 111)
33. Petitioner's appraiser acknowledged a typographical error in the condition label of sale 1 which resulted in a change in the adjusted price per square foot. This correction did not change Petitioner's conclusion of value for the three years under appeal.
34. Petitioner's appraiser acknowledged an incorrect site area for sale 7 (based on Respondent's Exhibit R-7). This correction did not change Petitioner's conclusion of value for the three years under appeal.
35. Petitioner's sale 8 discloses the separate sale of the big box store from the sale of a separate outlot. In other words, sale 8 did not include the separate sale of the transacted outlot.
36. Petitioner's appraiser identified additional big box transactions for consideration. (Petitioner's Exhibit P-1, p 42) The properties are located in Westland, Jenison, Berlin Township, and Warren.
37. Petitioner's appraiser identified additional local transactions for consideration. (Petitioner's Exhibit P-1, p 43) The properties are located in Marquette, Petosky and Saint Ignace.
38. Petitioner's appraiser reviewed two Wisconsin sales located in Oshkosh and Green Bay. (Petitioner's Exhibit P-1, p 43)
39. Based on the parties' stipulated square footage of 166,196, Petitioner's appraiser revised opinion of value was $3,300,000 for each year under appeal.
40. Respondent submitted a valuation disclosure prepared by Daina Norden.
41. Daina Norden is the assessor for the city of Escanaba. She is a Michigan Advanced Assessing Officer (MAAO) formerly known as a Level 4 Assessor.
42. Respondent's valuation disclosure includes the cost sales comparison approaches to value for the years under appeal.
43. Respondent's cost approach is based entirely on the subject property assessment record cards.
44. Respondent's cost approach did not include any functional obsolescence for the subject property. (TR, pp 149 and 188)
45. Respondent's valuation disclosure includes the disclaimer, "The sole purpose of this 'Valuation Summary' is to properly disclose the methods used by the assessor to accurately value property using assessment practices as encouraged by the Michigan State Commission." (Respondent's Exhibit R-9, p 4)
46. Page 53 of Respondent's valuation disclosure includes a quote from the General Property Tax Act (Section 211.10e) which states, "[All assessing officials] . . . shall use only the official assessor's manual or any manual approved by the state tax commission,

consistent with the official assessor's manual, with their latest supplements, as prepared or approved by the state tax commission as a guide in preparing assessments."

47. Respondent's sales comparison approach includes two sales and two listings (Respondent's Exhibit R-9, p 48) as well as six other sales reviewed (Respondent's Exhibit R-9, p 50).
48. Respondent's assessor did not make any adjustments to her comparable listings or sales data.
49. Respondent's assessor researched and prepared Respondent's Exhibits 1 through 8. (TR, pp 155-163)
50. Respondent's sales study included approximately 12 sales to derive an economic conditions factor (ECF). Ms. Norden was unable to identify the specific sales used to derive the ECF. (TR, pp 192-193)
51. Respondent's assessor is not a licensed real estate appraiser in the state of Michigan.
52. Respondent's review appraiser, Miles Anderson is a Certified General Real Estate Appraiser in the state of Michigan.
53. Respondent's review appraiser is a designated member of the Appraisal Institute.
54. Respondent's review appraiser performed a "limited appraisal review analysis" of Petitioner's appraisal. (TR, p 206) Further, Mr. Anderson stated that ". . . the scope of this review is characterized as a technical 'desk' review." (Respondent's Exhibit R-10, p 50)
55. Respondent's review appraiser invokes professional appraisal standards for his review appraisal report. (Respondent's Exhibit R-10, p 48)
56. Respondent's review appraiser states, "No USPAP standards or compliance will be reviewed or analyzed in this report. Should the client wish a USPAP review to be completed they should contract with a USPAP expert for review of the report." (Respondent's Exhibit R-10, p 2)
57. Respondent's review appraiser sets forth three definition sources for a big box store. The sources are Investopedia, Business Dictionary.Com, and Wikipedia. (TR, p 220)
58. Respondent's review appraiser did not rely on the definition of big box store from the Appraisal Institute, *The Dictionary of Real Estate*, (Chicago: 5th ed, 2010), p 229.
59. Respondent's review appraiser converted Petitioner's percentage adjustments into dollar adjustments. (TR, pp 215-216, Respondent's Exhibit R-10, p 14)
60. Respondent's review appraiser does not include his qualifications within the appraisal review report. (TR, pp 236-237)
61. Respondent's review appraiser denotes the strengths of Petitioner's appraisal report on page 47 of Respondent's Exhibit R-10. The alphabetized list of sixteen strengths includes "highest and best use analysis", "sales comparison approach", and "appraiser credentials".

APPLICABLE LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value. See MCL 211.27a.

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50 percent. . . . Const 1963, art 9, sec 3.
>
> The Michigan Legislature has defined "true cash value" to mean:
>
> the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1).

The Michigan Supreme Court has determined that "[t]he concepts of 'true cash value' and 'fair market value' . . . are synonymous." *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

"By provisions of [MCL] 205.737(1) . . . , the Legislature requires the Tax Tribunal to make a finding of true cash value in arriving at its determination of a lawful property assessment." *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 378 NW2d 590 (1985). "It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case." *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991). In that regard, the Tribunal "may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735a(2). The Tribunal's factual findings must be supported "by competent, material, and substantial evidence." *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp, supra at* 352-353.

"The petitioner has the burden of proof in establishing the true cash value of the property." MCL 205.737(3). "This burden encompasses two separate concepts: (1) the burden of

persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin Steel Corp, supra* at 354-355. However, "[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessments in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question." MCL 205.737(3).

The three most common approaches to valuation are the capitalization of income approach, the sales comparison or market approach, and the cost-less-depreciation approach. *Meadowlanes, supra* at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968). "The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading." *Jones & Laughlin Steel Corp, supra* at 353 (citing *Antisdale, supra at 276 n 1).* The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984).

CONCLUSIONS OF LAW

Petitioner developed and analyzed the income and sales comparison approaches to value. Respondent developed and analyzed cost and sales comparison approaches to value, but only conveys an indication of value from the cost approach. As reflected in the findings of fact, the parties have stipulated that the income approach to value is not relevant to this tax appeal. Petitioner's appraiser was charged with determining the market value of the subject property for the 2012, 2013 and 2014 years under appeal. Respondent was charged with defending the assessments for the subject property for those years under appeal.

As noted in the extensive findings of fact, Respondent's documentary and testimonial evidence has inconsistencies, contradictions and misrepresentations. Specifically, Respondent's

steadfast adherence to the State Tax Commission guidelines for mass appraisal is commendable but misplaced for the valuation of a single property. Regarding a cost approach analysis, the subject improvements are less than ten years old and would indicate minimal physical depreciation. However, Respondent's assessor did not account for functional or external obsolescence within her cost approach to value. Petitioner's assertion to the limitations of the cost approach is noteworthy in this instance. Built-to-suit construction, 2nd generation users, and renovation costs demonstrate functional obsolescence which is difficult to calculate. Petitioner has convincingly articulated that 1st generation users develop big box retail space to enhance retail sales and not to optimize market value to the property. For these reasons, Respondent's cost approach is given no weight or credibility in the determination of market value for the subject property.

Respondent sets forth listings and sales data for the proposition of a sales comparison approach. The missing link between Ms. Norden's data and a comparative methodology is analytical adjustments. Respondent's general reference to this data is not the equivalent of comparative analysis. Respondent's ten properties are located in Michigan and Wisconsin; informational write-ups were included for six out of the 10 properties. Overall, the data lacks necessary and important information for sufficient analysis. Again, identification of these properties did not result in an application, an analysis or adjustments to the subject property. Ms. Norden's reluctance to analyze leased fee sales or alleged deed restricted sales is as much an indication of her valuation inexperience. (TR, pp 152-153) Respondent's listings and sales amount to raw, unadjusted, unapplied data relative to the subject property. Lastly, Respondent's challenge over Petitioner's use of southeastern Michigan sales is without merit. Respondent's own data includes sales in Flint, Berlin Township, and Fort Gratiot. For these reasons,

Respondent's listings and sales data is not sufficient to arrive at an independent determination of value for the subject property.

Next, Respondent's review of Petitioner's appraisal report lacks any substance or relevance to the valuation of the subject property. In other words, Respondent's scope of work outlining the limited desk review is devoid of any application to the market. First, Mr. Anderson's conclusory statements without the support of market evidence are not common or acceptable in appraisal practice and theory. Merely rejecting the value conclusions based on alleged errors is not persuasive. (Respondent's Exhibit R-10, p 2) Second, Mr. Anderson's reliance on internet definitions for a big box store is striking given his membership in the Appraisal Institute. The avoidance of a commonly used professional definition does not promote credibility or public trust. Third, Mr. Anderson's conversion of Petitioner's percentage adjustments into monetary adjustments is nonsensical.

> Adjustments can be made either to total property prices or to appropriate units of comparison. Often the transactional adjustments – property rights conveyed, financing, conditions of sale (motivation), expenditures made immediately after purchase, and market conditions (date of sale) – are made to the total sale price. The adjusted sale price is then converted into a unit price and adjusted for property-related elements of comparison such as physical and legal characteristics. Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 14th ed, 2013), pp 389-390.

Mr. Anderson's conversion of Petitioner's adjustments is misguided and misplaced. Petitioner's percentage adjustments were derived from his opinions, analyses, and conclusions. Based on quantitative and qualitative methodologies, Petitioner's indications of value certainly would have changed based on monetary adjustments. Petitioner did not analyze its comparable sales on the basis of monetary adjustments. One measurement of adjustment is not reciprocal to the other measurement of adjustment. Again, Mr. Anderson's conversion of adjustments was not supported by anything other than his own inclination to challenge Petitioner's adjustments. Fourth, Mr. Anderson's own invoked professional standards and ethics do not apply to the

review of Petitioner's appraisal report. This oddity is compounded by Mr. Anderson's own admission of not knowing which professional standard is applied to his appraisal review assignment. (TR, p 237) Fifth, Mr. Anderson misconstrued the sales data within Petitioner's market analysis (Petitioner's Exhibit P-1, pp 21-23) based on his definition of big box stores of at least 50,000 square feet. In fact, Petitioner's market analysis encompasses sales of retail stores; Petitioner's appraiser did not portray this market analysis data exclusively as big box sales data. Lastly, Mr. Anderson's noted strengths of Petitioner's appraisal report include appraiser credentials. However, Mr. Anderson did not believe that his own credentials needed to be included in his appraisal review report. Overall, Mr. Anderson's acknowledged strengths of Petitioner's appraisal report contradict the subjective appraisal review. For these reasons, Respondent's appraisal review is not meaningful and is misleading. "An appraiser must not allow assignment conditions to limit the scope of work to such a degree that the assignment results are not credible in the context of the intended use."[1] In the instant case, the review appraiser's responsibility for the scope of work decisions are entirely his own and not based on the opinions and conclusions drawn from Respondent's attorney or assessor. "An appraiser must not allow the intended use of an assignment or a client's objectives to cause the assignment results to be biased."[2] As a final measure, there is no coincidence that an appraiser's credibility (based on invoked standards and ethics) is the same as the legal definition of credible.[3] Respondent's appraisal review is so narrow as to be baseless in the context of this tax appeal. Therefore, Respondent's appraisal review is given no weight or credibility in the independent determination of market value for the subject property.

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[1] The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice,* (Chicago: 2014-2015 Edition), p U-14.
[2] *Id.,* p U-14.
[3] *Id,* p U-2 and West, *Black's Law Dictionary*, (St. Paul, 9th ed. 2010), p 338.

Petitioner was able to explain and provide documentation for the sales comparison approach. Mr. Torzewski provided extensive sales of big box stores throughout the state. The data included comparables in southeast Michigan, as well as other competing market areas. This comparative data is further supported by sales data within the market analysis of his appraisal report. He analyzed eight sales for each year under appeal with five additional big box transactions and three local transactions for the sales comparison approach. The overall data illustrated to the Tribunal the impact of sales of retail big box stores for the three-year period. The comparable data was analyzed in conjunction with supported market conditions. Moreover, Mr. Torzewski's testimony regarding the consideration of deed restrictions is meaningful to his overall analysis. The application of available data to the subject property is persuasive. Therefore, Petitioner's sales comparison approach is meaningful to the independent determination of market value for the subject property.

Petitioner's comparison analysis and adjustments reflect market actions; however, Petitioner's reconciliation of the adjusted sale prices for the three years under appeal is incomplete. Petitioner concludes to the values by averaging the adjusted sales prices. The reconciliation of approaches is similar to the reconciliation of sales data. Reconciliation is an appraiser's opportunity to fill in gaps, and to prove overall logic and reasoning for the value conclusions. Averaging adjusted sales prices infers equal weight and consideration to the data. In this instance, Petitioner's data, even after adjustments, indicates a given range in adjusted sales prices. "Even when adjustments are supported by comparable data, the adjustment process and the values indicated reflect human judgment. . . . The sales comparison approach is not formulaic. It does not lend itself to detailed mathematic precision. Rather, it is based on judgment and experience as much as quantitative analysis." Appraisal Institute, *The Appraisal*

of Real Estate, (Chicago: 14th ed, 2013), p 394. The strengths and weaknesses of each comparable sale are examined for reliability and appropriateness. Petitioner's appraiser provided consistent testimony and explanatory narration for his comparison analysis and adjustments. Nonetheless, certain sales are more germane for each year under appeal. The sales comparison approach for each year is reconciled with the similarities and dissimilarities of each comparable sale. Petitioner's elaborative comparison analysis gives rise to more than averaged value conclusions. The Tribunal agrees with Petitioner's sales comparisons, but disagrees with the reasoning for the concluded (averaged) prices per square foot.

In regards to the 2012 valuation, Petitioner's sale 4 has minimal net adjustments and sold close to the December 31, 2011 tax day. Sales 1, 3, 4, 5, and 8 have gross building area greater than 100,000 square feet. Sales 3 and 7 are outliers to the overall dataset. Sale 5 is the closest to the subject in gross building area. Sale 8 is the oldest sale, occurring in 2009; this sale is less reliable. The smaller gross building area comparable sales indicate larger prices per square feet in the comparative analysis. Therefore, a reasoned and reconciled price per square foot for the 2012 valuation is $20 or calculated as a value of $3,325,000.

In regards to the 2013 valuation, Petitioner's sale 3 has minimal net adjustments and sold close to the December 31, 2012 tax day. However, Sales 3 and 7 are outliers to the overall dataset. Sales 1, 3, 4, 5, and 8 have gross building area greater than 100,000 square feet. Sale 5 is the closest to the subject in gross building area. Sale 8 is the oldest sale, occurring in 2009; this sale is less reliable. The smaller gross building area comparable sales indicate larger prices per square feet in the comparative analysis. Therefore, a reasoned and reconciled price per square foot for the 2013 valuation is $21 or calculated as a value of $3,350,000.

In regards to the 2014 valuation, Petitioner's sale 4 has zero net adjustments. Sale 1 sold closest to the December 31, 2013 tax day. Sales 3 and 7 are outliers to the overall dataset. Sales 1, 3, 4, 5, and 8 have gross building area greater than 100,000 square feet. Sale 5 is the closest to the subject in gross building area. Sale 8 is the oldest sale, occurring in 2009; this sale is less reliable. The smaller gross building area comparable sales indicate larger prices per square feet in the comparative analysis. Therefore, a reasoned and reconciled price per square foot for the 2013 valuation is $22 or calculated as a value of $3,660,000.

Again, the subject property is an owner-occupied building. The property has no history of an income stream. In other words, the subject is not an income-producing property. This is validated by both parties' stipulation that the income approach is not applicable in the analysis of the subject property in a fee simple interest. The primary focus is given to the sales comparison approach to value.

The Tribunal finds that Petitioner was able to show that the property was over-assessed for the tax years under appeal. The extensive findings of fact not only focus on Petitioner's significant evidence but focus on Respondent's insignificant evidence. To be certain, the Tribunal's deliberations are bound by the evidence as presented and not by any misguided perceptions of public policy motives. As such, and in light of the above, the Tribunal finds that Petitioner has succeeded in meeting its burden of going forward with competent evidence on the issue of true cash value, assessed value, and taxable value. Petitioner has provided credible documentary evidence and testimony for the 2012, 2013, and 2014 tax years at issue and, as such, the Tribunal finds Petitioner's data within the sales comparison approach is sufficient to arrive at an independent determination of value.

JUDGMENT

IT IS ORDERED that the subject property's true cash, assessed, and taxable values for the 2012, 2013 and 2014 tax years are those shown in the "Summary of Judgment" section of this Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the assessed and taxable values in the amounts as finally shown in the "Final Values" section of this Opinion and Judgment, subject to the processes of equalization, within 20 days of the entry of this Opinion and Judgment. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Opinion and Judgment within 20 days of the entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%, and (iv) after June 30, 2012, through December 31, 2014, at the rate of 4.25%.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

By: _____

Entered: NOV 07 2014

Exhibit C

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Menard Inc,
Petitioner,

v

MTT Docket Nos. 441600
and 14-001918

City of Escanaba,
Respondent.

Tribunal Judge Presiding
Marcus L. Abood

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

ORDER VACATING THE TRIBUNAL'S NOVEMBER 24, 2014 CORRECTED FINAL OPINION AND JUDGMENT

CORRECTED FINAL OPINION AND JUDGMENT

On December 15, 2014, Respondent filed a motion requesting that the Tribunal reconsider its decision in this case. In its Motion, Respondent states that (i) the Tribunal "made a mathematical error when computing the SEV for 2013 . . ." which also affected the Tribunal's determination as to the subject property's taxable value for the 2013 and 2014 tax years; (ii) "[t]he Tribunal and . . . Petitioner['s] appraiser failed to note . . . that [five] of the [sales] comparables had use restrictions and failed to make any adjustments in determining the value of the subject property which did not have use restrictions;" (iii) the Tribunal erred in its reliance on Petitioner's Sales Comparable No. 1 as (a) it has use restrictions, (b) it resold less than four months later on January 21, 2014, for $1,750,000, (c) "Mr. Torzewski admitted that [his -10%] adjustment [to this comparable for condition] was incorrect during the trial," and (d) Mr. Torzewski failed to make an adjustment or provide discussion as to why no adjustment was necessary given the fact that this comparable is dissimilar to the subject property since it is attached to another retail space; (iv) Sales Comparable No. 3 "had large use restrictions which were not mentioned at all in Petitioner's Appraisal," and Mr. Torzewski failed to "mention . . . the cost to convert [Sales Comparable No. 3] into a light manufacturing plant;" (v) "the true 'fee simple' ownership [for Sales Comparable No. 3] . . . was a prior sale . . . in July of 2010 . . . [which] would calculate to $30.36 per sq. ft. . . . ;" (vi) Sales Comparable No. 4 "was a foreclosure sale[and] was also sold and converted into industrial space;" (vii) Sales Comparable No. 5 "was also sold as a manufacturing use and rezoned just prior to the sale to allow for the use remaining which was dictated by the greatly restricting use restrictions;" (viii) "use restrictions **demand** that the space be converted into something other than what the building was built for[– s]omething other than the highest and best use;" (ix) Mr. Torzewski committed "a flagrant violation of appraisal practice by . . . refus[ing] to admit that these [use] restrictions do affect the sales price of the property and further by his absence of even noting the restrictions exist;" (x) "on the contrary[, Mr. Torzewski] does admit that use restrictions affect the sales price in a property as it states in

his appraisal (Exhibit P-1) on page 42;" (xi) "USPAP says the report must contain sufficient information to enable the intended users to understand the report properly;"(xii) "the land [for Sales Comparable No. 7] is listed incorrectly as 150,282 sq. ft. and it should be 74,021 sq. ft. . . . ," (xiii) Sales Comparable No. 8 "has use restrictions[, and] . . . [c]ombining the entire parcel [for an 'extra lot'] and adjusting the sale for the -10% adjustment places the price per sq. ft. at $24.11;" (xiv) "[i]t would appear that [Petitioner's] . . . appraisal has an underlying Extraordinary Assumption which was not disclosed as part of the appraisal report;" (xv) the sales comparables that have use restrictions are not fee simple transactions; and (xvi) Mr. Torzewski's testimony contradicted his written appraisal report. Respondent, in furtherance of the foregoing, states:

> The [Tribunal,] by ignoring the facts of the sales and making no adjustment for the self-imposed use restrictions placed by the seller[,] is subsequently creating a value based on incorrect appraisal practices which ignore the highest and best use of the property and ignore the definition of true cash value which is the "usual selling price" and "being the price that could be obtained" and ignore fee simple ownership which is "**absolute ownership unencumbered by any other interest**" and ignore the obvious misrepresentations and false statement set forth in the appraisal thus concluding to a false value.

In sum, Respondent contends that "the Michigan Tax Tribunal should have upheld the assessment which utilized the cost approach to value [as] . . . [y]ou cannot adjust bad sales into a good indication of value[, and t]he best approach to valuation in this case is the cost approach . . . ."

The Tribunal, having considered the Motion and the case file, finds that Respondent's contention, asserting that the Tribunal erred in relying on Petitioner's sales comparison approach, lacks merit. Although deed restrictions can affect a property's market value and therefore must be considered, see *Lochmoor Club v City of Grosse Pointe Woods*, 10 Mich App 394, 398; 159 NW2d 756 (1968), Petitioner's appraiser, Mr. Torzewski, did take such factor into consideration in developing his sales comparison analysis and determined that the deed restrictions, on those properties that he *utilized*, had no effect on the properties' sales prices, and the Tribunal found this testimony, and analysis regarding the same, to be credible. More specifically, Mr. Torzewski credibly testified that "the majority of [the comparables he used] did [have deed restrictions] since they were mostly former Wal-Marts or Home Depot Stores;" however, "deed restrictions are pretty common for build-to-suit users to put in place some sort of a deed restriction," and the deed restrictions for the sales comparables utilized did not "affect[ ] the sales price." TR at 64-65. As a result, no adjustment for these sales comparables, absent any credible evidence to the contrary, was necessary. Further, to the extent that there were any errors or omissions in the appraisal that were not previously disclosed, Mr. Torzewski remedied the same during his testimony as a witness. Specifically, and including the foregoing wherein he testified that the *majority* of the sales comparables that he used did have deed restrictions, Mr. Torzewski also acknowledged the conditional adjustment error for Sales Comparable No. 1 and the error in the

site size for Sales Comparable No. 7, both of which did not affect his conclusion of value for the tax years at issue. See TR at 103-104. Additionally, Mr. Torzewski properly disclosed and separated the excess land that was part of the purchase price for Sales Comparable No. 8. See Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 14th ed, 2013) at 200-201. And, even if the Tribunal were to give Petitioner's Sales Comparable Nos. 1 and 4 less weight due to the dissimilarity of Sales Comparable No. 1, being attached to another retail space, and the condition of sale for Sales Comparable No. 4, being a foreclosure, the Tribunal's independent determination of the subject property's true cash value for the tax years at issue, based on the subject property's fee simple interest,[1] would still be within the range of valuations in evidence. See *President Inn Properties LLC v City of Grand Rapids*, 291 Mich App 625, 642; 806 NW2d 342 (2011). Further, despite any deed restrictions in the sales comparables utilized in Petitioner's sales comparison analysis, the sales are, contrary to Respondent's contentions, still fee simple transactions, as the grantees in those transactions obtained full ownership rights in the property, and, based on the circumstances presented in this case, Petitioner's sales comparison approach provided the most accurate valuation evidence of the subject property's usual price for which it would have sold for the tax years at issue. See *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

With that being said, however, Respondent's contention that the Tribunal "made a mathematical error . . ." is correct. Although the Tribunal, upon further review of its decision and the case file, attempted to correct the original Final Opinion and Judgment, issued on November 7, 2014, to accurately reflect Respondent's revised contention of the subject property's taxable value for the 2014 tax year and the Tribunal's conclusion of the same, to bring the taxable value for the 2014 tax year into conformity with the mandates set forth in MCL 211.27a(2), such efforts were futile as the Tribunal failed to recognize that it inadvertently erred in its calculation of the subject property's true cash and state equalized values, as indicated in the Summary of Judgment section, for the 2013 tax year. As a result, the Corrected Final Opinion and Judgment, issued on November 24, 2014, shall be vacated in its entirety, and the correct values, reflecting the parties' contentions and the Tribunal's decision, shall be as indicated below.

Given the above, Respondent has demonstrated a palpable error, with regard to the Tribunal's mathematical error, that misled the Tribunal and the parties and would have resulted in a different disposition if the error was corrected. See MCR 2.119. Therefore,

IT IS ORDERED that Respondent's Motion for Reconsideration is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that the Tribunal's November 24, 2014 Corrected Final Opinion and Judgment is VACATED.

IT IS FURTHER ORDERED that that the Summary of Judgment section in the Final Opinion

[1] See *Lowe's Home Centers Inc v Marquette Twp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket Nos. 314111 and 314301).

and Judgment is modified as follows:

The subject property's 2012, 2013, and 2014 True Cash Values (TCVs), Assessed Values (AVs), and Taxable Values (TVs) as determined by Respondent are:

Parcel No. 051-420-2825-100-006

	Respondent		
Year	TCV	SEV	TV
2012	$7,815,976	$3,907,988	$3,907,988
2013	$7,995,596	$3,997,798	$3,997,798
2014	$8,210,938	$4,105,469	$4,061,762

Petitioner's contentions are:

Parcel No. 051-420-2825-100-006

	Petitioner		
Year	TCV	SEV	TV
2012	$3,300,000	$1,650,000	$1,650,000
2013	$3,300,000	$1,650,000	$1,650,000
2014	$3,300,000	$1,650,000	$1,650,000

The Tribunal's conclusions are:

Parcel No. 051-420-2825-100-006

Year	TCV	SEV	TV
2012	$3,325,000	$1,662,500	$1,662,500
2013	$3,490,000	$1,745,000	$1,702,400
2014	$3,660,000	$1,830,000	$1,729,638

IT IS FURTHER ORDERED that all remaining portions of the Final Opinion and Judgment, except as modified herein, are incorporated into this Corrected Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as provided in this Corrected Final Opinion and Judgment within 20 days of entry of this Corrected Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of

this Corrected Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Corrected Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010; (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011; (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%; and (iv) after June 30, 2012, through June 30, 2015, at the rate of 4.25%.

This Corrected Final Opinion and Judgment resolves the last pending claim and closes this case.

By _____

Entered: JAN 07 2015
lka

Exhibit D

2016-2017

UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE

Effective January 1, 2016 through December 31, 2017

PLUS

Guidance from the Appraisal Standards Board
+ USPAP ADVISORY OPINIONS
+ USPAP FREQUENTLY ASKED QUESTIONS (FAQ)

USPAP with corrections from 6/1/16 Errata.

APPRAISAL STANDARDS BOARD

THE APPRAISAL FOUNDATION

Authorized by Congress as the Source of Appraisal Standards and Appraiser Qualifications

2. the terms of sale (e.g., cash, cash equivalent, or other terms); and
3. the conditions of sale (e.g., exposure in a competitive market for a reasonable time prior to sale).

Appraisers are cautioned to identify the exact definition of market value, and its authority, applicable in each appraisal completed for the purpose of market value.

MASS APPRAISAL: the process of valuing a universe of properties as of a given date using standard methodology, employing common data, and allowing for statistical testing.

MASS APPRAISAL MODEL: a mathematical expression of how supply and demand factors interact in a market.

PERSONAL PROPERTY: identifiable tangible objects that are considered by the general public as being "personal" - for example, furnishings, artwork, antiques, gems and jewelry, collectibles, machinery and equipment; all tangible property that is not classified as real estate.

PRICE: the amount asked, offered, or paid for a property.

Comment: Once stated, *price* is a fact, whether it is publicly disclosed or retained in private. Because of the financial capabilities, motivations, or special interests of a given buyer or seller, the price paid for a property may or may not have any relation to the *value* that might be ascribed to that property by others.

REAL ESTATE: an identified parcel or tract of land, including improvements, if any.

REAL PROPERTY: the interests, benefits, and rights inherent in the ownership of real estate.

Comment: In some jurisdictions, the terms *real estate* and *real property* have the same legal meaning. The separate definitions recognize the traditional distinction between the two concepts in appraisal theory.

REPORT: any communication, written or oral, of an appraisal or appraisal review that is transmitted to the client upon completion of an assignment.

Comment: Most reports are written and most clients mandate written reports. Oral report requirements (see the RECORD KEEPING RULE) are included to cover court testimony and other oral communications of an appraisal or appraisal review.

SCOPE OF WORK: the type and extent of research and analyses in an appraisal or appraisal review assignment.[9]

SIGNATURE: personalized evidence indicating authentication of the work performed by the appraiser and the acceptance of the responsibility for content, analyses, and the conclusions in the report.

VALUATION SERVICES: services pertaining to aspects of property value.

Comment: Valuation services pertain to all aspects of property value and include services performed both by appraisers and by others.

VALUE: the monetary relationship between properties and those who buy, sell, or use those properties.

[9] See SCOPE OF WORK RULE.

market rent would be used in the appraisal, ignoring the effect of the individual, actual contract rents.

(d) analyze the effect on value, if any, of the assemblage of the various parcels, divided interests, or component parts of a property; the value of the whole must not be developed by adding together the individual values of the various parcels, divided interests, or component parts; and

Comment: When the value of the whole has been established and the appraiser seeks to value a part, the value of any such part must be tested by reference to appropriate market data and supported by an appropriate analysis of such data.

(e) when analyzing anticipated public or private improvements, located on or off the site, analyze the effect on value, if any, of such anticipated improvements to the extent they are reflected in market actions.

Standards Rule 6-7

In reconciling a mass appraisal an appraiser must:

(a) reconcile the quality and quantity of data available and analyzed within the approaches used and the applicability and relevance of the approaches, methods and techniques used; and

(b) employ recognized mass appraisal testing procedures and techniques to ensure that standards of accuracy are maintained.

Comment: It is implicit in mass appraisal that, even when properly specified and calibrated mass appraisal models are used, some individual value conclusions will not meet standards of reasonableness, consistency, and accuracy. However, appraisers engaged in mass appraisal have a professional responsibility to ensure that, on an overall basis, models produce value conclusions that meet attainable standards of accuracy. This responsibility requires appraisers to evaluate the performance of models, using techniques that may include but are not limited to, goodness-of-fit statistics, and model performance statistics such as appraisal-to-sale ratio studies, evaluation of hold-out samples, or analysis of residuals.

Standards Rule 6-8

A written report of a mass appraisal must clearly communicate the elements, results, opinions, and value conclusions of the appraisal.

Each written report of a mass appraisal must:

(a) clearly and accurately set forth the appraisal in a manner that will not be misleading;

(b) contain sufficient information to enable the intended users of the appraisal to understand the report properly;

Comment: Documentation for a mass appraisal for ad valorem taxation may be in the form of (1) property records, (2) sales ratios and other statistical studies, (3) appraisal manuals and documentation, (4) market studies, (5) model building documentation, (6) regulations, (7) statutes, and (8) other acceptable forms.

(c) clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment;